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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
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WILLIAM A. MUNDELL
Chairman
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Commissioner
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Commissioner

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000A-97-0238

AT&T'S COMMENTS AND REPLY COMMENTS IN FCC WC DOCKET NO. 02-148

AT&T Communications of the Mountain States, Inc., and TCG Phoenix (collectively "AT&T") hereby file a copy of the Comments and Reply Comments of AT&T Corp. in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota. Qwest previously filed its Reply Comments with the Commission.

I. INTRODUCTION

On June 13, 2002, Qwest Communications International, Inc. (Qwest) filed a joint application for authorization to provide in-region, interLATA service in the States of Colorado, Idaho, Iowa, Nebraska, and North Dakota, pursuant to section 271 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 271. Significant portions of its evidence offered to the Federal Communications Commission ("FCC') are based on Arizona results from the Arizona OSS Test and other record evidence gathered in this proceeding.

II. AT&T REPLY COMMENTS CRITICIZE THE QWEST APPLICATION IN SPECIFIC AREAS OF OSS REQUIREMENTS

A. CHANGE MANAGEMENT PROCESS DEFICIENCIES

AT&T's Reply Comments at the FCC draw specific attention to OSS issues including the adequacy of the Qwest Change Management Process ("CMP"), specifically that Qwest has failed to establish a pattern of compliance with its process elements, timetables, and procedures[1] and Qwest has failed to implement a competent competitive local exchange carrier ("CLEC") testing environment that is separate from production and a mirror of the results obtained from production processing.[2] Qwest's Stand Alone Test Environment ("SATE") falls short of FCC requirements in several material aspects of critical performance. Qwest has not satisfied its burden of proof as to the adequacy of its CMP, and the application should be rejected as a result.

B. PRE-ORDERING SYSTEM DEFICIENCIES

Qwest's OSS interfaces do not enable competitors to effectively integrate application-to-application pre-ordering interfaces with the ordering interface.[3] The consequence of the deficiencies is that CLECs do not have parity of access to pre-ordering information that is required under section 271. The address validation processes that verify the accuracy of CLEC-submitted orders based on the information obtained from the Qwest Customer Service Record ("CSR") are error prone because Qwest uses alternate databases to validate the address submitted. The result is a cumbersome manual process foisted upon CLECs to acquire valid address information from Qwest and then a double order entry routine – once to submit the order to Qwest and another entry to record the order in the CLEC system.

[1] AT&T Reply Comments at 18-19.
[2] *Id.* at 19-23.
[3] *Id.* at 25-28.

C. ORDERING AND PROVISIONING SYSTEM DEFICIENCIES

AT&T's Reply Comments note that Qwest's systems are plagued by high-rates of order rejections, manual processing of electronically submitted CLEC orders, and manual errors.[4]

The Reply Comments address the "LSR/Order mismatch" rates submitted by Qwest and identify the reasons that they are unreliable.[5] The rates are based only on orders for a period of five calendar days – which began on the day after Qwest implemented its process for "tracking" such mismatches.[6] The "mismatch rates" reported by Qwest are also understated because Qwest has improperly included *all* completed orders (even electronically processed orders that were not manually processed) in the denominator of its calculation.[7] And, given the time frame of its orders, Qwest cannot possibly have included in its study "all orders qualified for measurement OP-5" as it claims, since that measurement encompasses new installations that are free of trouble reports within 30 days of initial installation.[8]

AT&T further notes that the comments filed in the FCC case confirm that Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete.[9] The comments show, for example, that Qwest does not return jeopardy notices in a timely fashion, transmits jeopardy notices after Qwest initially issued

[4] *Id* at 30-32.
[5] *Id.* at 32-33.
[6] *See* Qwest July 10 *ex parte* at 13 (Tab 4); DOJ Eval. at 22 n.97.
[7] Qwest July 10 *ex parte* at 13 (Tab 4).
[8] Qwest July 10 *ex parte* at 13 (Tab 4). Qwest contends that it analyzed "all orders from June 28 through July 3 to determine the volume of the LSR/order mismatch situations as a percentage of all orders qualified for measurement by OP-5." *Id.* In order to ensure that "all orders qualified for measurement by OP-5" were included in its analysis, however, Qwest would be required to wait until August 2 (30 days after the orders completed on July 3, which was the last day of the time period used by Qwest). Because Qwest filed its data in its *ex parte* letter on July 10 – more than three weeks prior to August 2 – its analysis could not have encompassed the universe that it describes. CLECs and their customers may not discover problems that resulted in "mismatches" (such as the failure to provision features ordered by the customer) until well after the seven-to-twelve day period that elapsed between the June 28-July 3 period used by Qwest in its analysis and the July 10 *ex parte*. For example, a customer may not attempt to use features that it ordered (such as three-way calling), or discover that the feature had not been installed, until several weeks – or even more than 30 days – after the scheduled installation date. Such a situation would not have been captured in Qwest's study (or, in some instances, in the OP-5 metric itself).
[9] AT&T Reply Comments at 34.

a FOC but later discovered that the order was in error, and issues completion notices before provisioning has actually been completed.[10] These deficiencies put CLECs at a severe competitive disadvantage with Qwest's retail operations, which have real-time, fully automated access to order status information.

D. QWEST'S BILLING PROCESSES FAIL TO MEET THE FCC'S REQUIREMENTS FOR NON-DISCRIMINATORY ACCESS

AT&T's comments discuss the fact that contrary to prior FCC orders,[11] Qwest's wholesale electronic bills are not auditable.[12] They are not transmitted using the industry standard CABS BOS BDT format, which would permit CLECs to use computer software to audit the data. Instead, Qwest generates electronic bills using its non-industry-standard "CRIS" system in its own proprietary format. Moreover, Qwest has advised CLECs that the new CRIS bills will not be subject to CABS BOS edits, which ensure that all fields on the bill are populated correctly.[13]

Dated this 29th day of August, 2002.

**AT&T COMMUNICATIONS
OF THE MOUNTAIN STATES, INC.,
AND TCG PHOENIX**

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[10] *See* AT&T Comments at 43; Covad Comments at 25-28; WorldCom Comments at 12-15.
[11] *New Jersey 271 Order* ¶ 124; *Pennsylvania 271 Order* ¶ 22.
[12] AT&T Reply Comments at 34-39
[13] *See* Memorandum to Bill Difference Distribution Group from Catriona Dowling (Qwest), dated July 11, 2002. The lack of such edits increases the likelihood that the bill will be inaccurate.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.,	)	
Consolidated Application for Authority to	)	
Provide In-Region, InterLATA Services in	)	WC Docket No. 02-148
Colorado, Idaho, Iowa, Nebraska and North	)	
Dakota	)	
	)	

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July 3, 2002

TABLE OF CONTENTS

FCC ORDERS CITED

SHORT CITE	FULL CITE
BellSouth Louisiana II Order	Memorandum Opinion and Order, *Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599 (1998)
Georgia/Louisiana 271 Order	Memorandum Opinion and Order, *Joint Application of BellSouth Corporation et al. for Provision of In-Region InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35 (rel. May 15, 2002)
Inputs Order	Tenth Report and Order, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd. 20156 (1999)
KS/OK 271 Order	Memorandum Opinion and Order, *Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd. 6237 (2001)
Local Competition Order	First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996), *aff'd in part and vacated in part by Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part by AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999)
Maine 271 Order	*Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Maine*, CC Docket No. 02-61 (rel. June 19, 2002)
Massachusetts 271 Order	Memorandum Opinion and Order, *Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Massachusetts*, 16 FCC Rcd. 8988 (2001)
New Jersey 271 Order	Memorandum Opinion and Order, *Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in New Jersey*,WC Docket No. 02-67 (rel. June 24, 2002)
NY 271 Order	Memorandum Opinion and Order, *Application by Bell*

SHORT CITE	**FULL CITE**
	Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd. 3953 (1999)
Non-Accounting Safeguards	
Pennsylvania 271 Order	Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419 (2001)
Platform Order	Fifth Report and Order, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 21323 (1998)
Second Advanced Services Order	Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 19237 (1999)
South Carolina 271 Order	Memorandum Opinion and Order, *Application of BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd. 539 (1997)
Supplemental Order Clarification	Supplemental Order Clarification, *Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996,* 15 FCC Rcd. 9587 (2000)
Texas 271 Order	Memorandum Opinion and Order, *Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354 (2000)
UNE Remand Order	Third Report And Order And Further Notice Of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 (1999)
Vermont 271Order	*Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Vermont*, CC Docket No. 02-7 (rel. April 17, 2002)

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Provide In-Region, InterLATA Services in	)	WC Docket No. 02-148
Colorado, Idaho, Iowa, Nebraska and North	)	
Dakota	)	
	)	

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these comments in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota.

INTRODUCTION AND SUMMARY

Process, not substance, is the central theme of Qwest's unprecedented 5-state section 271 application. The message behind this application is unmistakably clear: accept at face value Qwest's claims of compliance with the federal law requirements of section 271, defer entirely to state commission recommendations, and, whatever you do, please don't look behind the curtain. Abdication, not independent review, is called for, Qwest contends, because the "new" Qwest is different from all prior section 271 applicants (and from its predecessor US West) and, unlike prior applicants, can be trusted to do the right thing for competition and consumers.

The new Qwest *is* different from prior applicants, but only in ways that demand more, not less, Commission scrutiny. No prior section 271 applicant can match Qwest's long and shameful record of blatant section 271 violations – violations that defy Qwest's express representations to the Commission, that began the minute Qwest swallowed US West, and that continue unabated today. No prior applicant has generated so many serious and well-publicized questions about (and ongoing investigations of) its candor to regulators and to the public. And, certainly, no prior applicant has been revealed to have been leading a double life, claiming full compliance with the statute while entering patently discriminatory secret deals to silence critics and evade informed state commission, Commission and third party review of its compliance with the core section 271 checklist requirements. Context is king, and this extraordinary backdrop demands that Qwest's Application receive the most searching Commission review.

Qwest's aversion to independent, principled Commission review of its Application is understandable, for Qwest has much to hide. That should be evident from a critical examination of Qwest's opening proclamation that its Application "stands on the foundation" of "two overriding corporate commitments" – to improve "service quality" and to "accelerate and complete the process of opening its local market to competition" – that Qwest made in support of its merger with US West. Application at 2. Qwest claims that it has met these commitments and that the "local exchange market in the Qwest region is entirely different than it was two years ago." *Id.* In fact, customer satisfaction with Qwest's service has *declined* dramatically since the merger closed (as the other Bells' ratings have improved), and Qwest now ranks *dead last*, by a considerable margin, among local telephone providers.[1] Far from working to accelerate the opening of its local markets to competition, Qwest has simply substituted different, but equally effective, schemes to prevent that from happening, as illustrated by one state commission's recent determination that Qwest unlawfully refused to allow AT&T even to *test* a network element-based competitive local offering (and then deliberately fabricated evidence in an attempt

[1] *See, e.g.*, "Qwest Receives Lowest Rating, Rocky Mountain News (May 21, 2002) (available at http://www.rockymountainnews.com/drmn/business/arti.../0,1299,DRMN_4_1158517,00.htm; http://www.theacsi.org/first_quarter.htm#tel1.

to defend its gross misconduct).[2] And Qwest's local markets are *not* materially different than they were two years ago. Contrary to the misleading figures in the Application, there is still almost no residential local competition in Colorado, Iowa, Idaho, Nebraska or North Dakota – as Qwest's recent *ex parte* submissions in response to Department of Justice inquiries starkly confirm.

Qwest's merger with US West has not created an altruistic "super Bell." Rather, Qwest's notable achievement has been to transform a financially strong monopolist into a desperate, financially strapped monopolist. The timing of this Application reflects no irreversible opening of Qwest's local markets to competition, but only Qwest's calculation that it could ill afford to break yet another of its reckless section 271 filing date promises. Because state and third party review of key issues is far from complete, the Application consists largely of stopgap measures (*e.g.*, last-minute rates and other terms that have never been reviewed), baseless pleas that key deficiencies be ignored (*e.g.*, third party testing deficiencies that remain unresolved because Qwest refused further testing), and legally doomed gambits to foist some of the most obvious and fatal section 271 problems into other proceedings (*e.g.*, Qwest's pervasive secret deals discrimination).

As a result, the Application does not remotely satisfy Qwest's burden to prove that it has satisfied each of the competitive checklist requirements and that granting its request for interLATA authority in five states where local markets remain closed to meaningful residential competition will serve the public interest. Indeed, as detailed below, the Application is deficient in virtually every relevant respect.

[2] *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against Qwest Corporation*, Docket No. P-421/C-01-391, Order Granting Temporary Relief and Notice and Order for Hearing, issued April 30, 2001.

The Commission's review can begin and end with the fact that Qwest has not even attempted to demonstrate how it could satisfy its Checklist Item 2 burden to prove that it is providing "access" to its network facilities on terms and conditions that are "nondiscriminatory," 47 U.S.C. § 271(c)(2)(B)(ii) – or, indeed, how it could satisfy its burden with respect to *any* of the eight checklist items that expressly require nondiscrimination – in the face of its ongoing, deliberate, and region-wide scheme to violate those very nondiscrimination obligations by conspiring to confer secret, more favorable interconnnection agreement terms on selected CLECs. These secret agreements – more of which Qwest grudgingly discloses each day in response to subpoenas and other discovery requests in ongoing state commission investigations – blatantly favor some CLECs over others and therefore constitute dispositive evidence that Qwest is not today providing the required nondiscriminatory access.

It is hard to imagine misconduct that strikes more directly at the heart of section 271. In an effort to create the false appearance that it has opened its local markets to competition, Qwest has promised favorable terms to carriers that pose little threat to its core market dominance in return for those carriers' promises not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest. So long as it remained a secret, Qwest's scheme was an ingenious one. While carriers that posed a real threat to Qwest's local monopolies were kept at bay with unfavorable terms, Qwest could point to carriers buoyed by secret deals as evidence that its markets are open to competition (and that it has satisfied Track A). All looked well to the outside world, because, with special arrangements in place, Qwest's performance to those latter carriers would often be acceptable (and when it was not, those carriers would be bound by their "secret deals" not to complain to regulators or to challenge Qwest's compliance with section 271 requirements). The idyllic perceptions created by this complex web of deception and misinformation obviously created a much more favorable environment for Qwest in Section 271 and related proceedings.

But Qwest has been caught, and it must now bear the consequences of its intentional misconduct. One such consequence – and there should be many others – is that this Application must be denied. That is so for a number of reasons. The clear checklist item 2 violation is the most obvious. There is no way to characterize Qwest's secret price and non-price discrimination as providing access to network facilities on terms and conditions that are "nondiscriminatory." Given Qwest's complete failure to disclose to the Commission all (or, indeed, *any*) of the discriminatory terms that appear in its many secret deals, there is also no rational basis for the Commission to conclude that Qwest has satisfied the seven other checklist items that include nondiscrimination requirements. If Qwest contends that it offers nondiscriminatory interconnection (as required by checklist item 1), for example, it must prove that, and it cannot do so without submitting all of its secret deals to the Commission and demonstrating that it does not, through those agreements, discriminate in the provision of interconnection. And, as one important component of an unrivaled pattern of discriminatory, anticompetitive and unlawful conduct that goes directly to the core inquiry whether Qwest's local markets are open and likely to remain so, Qwest's secret deals misconduct also precludes any finding that granting the requested interLATA authority is in the public interest.

The Application, in its shocking failure even to address these serious deficiencies, reflects Qwest's own recognition that it cannot meet its checklist and other burdens if it is forced to confront its secret deals practices in this proceeding. That is why Qwest recently filed a frivolous petition seeking a Commission declaration that Qwest's failure to file its secret interconnection agreements with state commissions did not violate section 252. Qwest cannot seriously hope to prevail in that proceeding; by its plain terms, section 252 requires Qwest to file "[a]ny" interconnection agreement it adopts by negotiation, 47 U.S.C. §§ 252(a), (e), and not merely some, or selected passages of, such agreements.[3] Rather, the declaratory order proceeding is nothing but a stalling ploy – Qwest will urge the Commission to ignore the mounting secret deals evidence here and address it only in that declaratory order proceeding. The Commission cannot lawfully do so. There is no possible resolution of the section 252 interconnection agreement *filing* issues raised in the declaratory order proceeding that could erase Qwest's *discrimination* in offering special terms to its secret deals partners that are not available to other requesting carriers. And nothing that the Commission could do in the declaratory order proceeding could eliminate the Commission's clear duty to consider Qwest's pervasive discrimination in determining whether Qwest has met its burden to demonstrate that it meets the checklist nondiscrimination requirements.[4]

Qwest's approach of "buying off" CLECs that would otherwise have brought evidence of its failure to adhere to the Act's market opening requirements to the attention of regulators has subverted the entire section 271 process. That has obvious and far-reaching implications for the states. Indeed, the only way in these circumstances to ensure that Qwest satisfies the statutory preconditions to interLATA authority is for state commissions to conduct comprehensive investigations, to force Qwest to come clean about all of its secret deals and to reform its discriminatory practices, and then to restart the section 271 process with full participation by all interested parties. As the secret deals evidence continues to mount, state commissions are beginning to recognize this. *See*, *e.g.*, Letter of Arizona Corporation Commissioner Jim Irvin to

[3] *See Petition For Declaratory Ruling Of Qwest Communications International, Inc.*, WC Docket No. 02-89 (filed Apr. 23, 2002); *Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc.*, WC Docket No. 02-89, at 6-10 (filed May 29, 2002).

[4] *See, e.g., Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) ("any further movement by the Commission on Qwest's Section 271 application must be suspended until the issues related to the compromised agreements are resolved") (Attachment 1 hereto).[5] But whatever course the states ultimately decide to take, Qwest, through its secret deals misconduct and its failure to join issue on the many section 271 implications of that conduct, has left this Commission with only one course: a finding that Qwest has not met its burden of demonstrating compliance with the checklist nondiscrimination requirements.

Qwest has failed to meet its checklist burden in many other respects as well. Qwest's claim that it has met its checklist item 2 burden to prove that network element rates in all five states are appropriately forward-looking and comply with the Commission's TELRIC rules, for example, is nonsensical. In three of the five states, Iowa, Idaho and North Dakota, rates were set many years ago using backward-looking methodologies that did not even purport to comply with the Commission's TELRIC rules. Iowa, for example, expressly *rejected* TELRIC, and has for years failed to comply with a district court remand vacating its patently unlawful pricing decision and directing it to "comply with the requirements of the FCC's rules."[6] A fourth state, Nebraska, conducted proceedings more recently, but based rates on a loop cost model that the Commission has found does not "adhere to sound engineering and forward-looking, cost-minimizing principles,"[7] and a switching cost model that Qwest openly acknowledged is designed not to estimate forward-looking costs, but "the actual, 'real world' costs that [Qwest] incurs."[8]

[5] *See also id.* ("What makes this situation unique is the subversive nature of these actions and their potential to taint the public deliberative Section 271 review process. Who knows what the outcome of the proceedings would have been if ALL parties of interest had fully participated?").

[6] *See U S West Communications, Inc.* v. *Thoms*, Civil No. 97-CV-70082 (S.D. Iowa).

[7] *See Platform Order*, 13 FCC Rcd. 21323 at ¶ 54 (1998).

[8] *See* AT&T Post Hearing Br. at 27-28 (Apr. 26, 1999) (*quoting* testimony of U S West witness Alan Bergman.

Recognizing that the approved rates in these four states cannot seriously be defended, Qwest makes only a token effort to do so.

Qwest claims that the Commission can nonetheless place the TELRIC stamp of approval on its Iowa, Idaho, Nebraska and North Dakota rates based upon arbitrary, last-minute reductions that Qwest claims have reduced the rates in all four states to Colorado levels. Claiming rights to such a "benchmarking" shortcut is remarkably presumptuous, given that the Commission has never approved Qwest's rates in *any* state. But even if the Commission could, consistent with the requirement of reasoned decisionmaking, benchmark against rates that it is simultaneously reviewing for the first time, Qwest's ploy would fail. As detailed below, even *after* the arbitrary reductions, Qwest's Iowa, Idaho, Nebraska, and North Dakota rates are not remotely comparable to its Colorado rates. Qwest's contrary claim is based upon wildly flawed cost comparisons that imply considerable disdain for the Commission's review process. Qwest's comparisons improperly include very high cost rural Iowa, Idaho and North Dakota exchanges that Qwest *does not even own* and that skew the cost comparisons; they exclude significant new recurring charges that Qwest sneaked in to all four state SGATs at the same time it reduced other charges; and, in direct contravention of the Commission's *New Jersey 271 Order*, they reflect national average minutes of use assumptions that mask important cost and rate differences, rather than the state-specific figures that Qwest could, and therefore should, have used. When the benchmarking comparisons are done properly, it is clear that Qwest's rates in the other states are, in fact, as much as *45 percent higher*, on a cost-adjusted basis, than its Colorado rates.

But Qwest's benchmarking claim would fail even if the other four states' rates did compare favorably to Colorado rates, because the Colorado rates quite plainly are *not* TELRIC-compliant. To the contrary, Qwest's loop, non-loop and non-recurring UNE rates are all substantially inflated by clear TELRIC errors. Qwest's Colorado loop rates, for example, improperly rely upon Qwest's embedded network, rather than the efficient, forward-looking analysis that the Commission's rules require in estimating outside plant costs. Qwest's recurring switching rates are based upon Qwest input assumptions that were never even reviewed by the Colorado commission and that both double count costs and reflect backward-looking network assumptions. And Qwest's Colorado non-recurring charge methodology was so bloated with improper manual processing and other phantom cost assumptions that it has produced, among other anomalies, hot cut rates that are a facially absurd $170. For these and other reasons detailed below, Qwest has not satisfied its checklist item 2 burden with respect to rates in Colorado, much less with respect to the four states it attempts to justify by comparison to Colorado.

Nor has Qwest met its burden of demonstrating that it is providing nondiscriminatory access to operations support systems ("OSS"). Qwest relies almost entirely on the "ROC" test conducted by KPMG Consulting – even describing KPMG's test as "determinative" of OSS-related issues. To the contrary, the Commission has repeatedly held that actual commercial usage data is far more probative in assessing whether a BOC is providing critically important parity of access to OSS. And although the availability of actual commercial usage data is necessarily limited here by the anemic levels of competitive entry, there is, as detailed below, ample proof that Qwest is not, in fact, providing parity of access in the real world. For example, Qwest's systems reject nearly one-half of all CLEC orders, and as many as two-thirds of orders that are not rejected fall out for manual processing.

Even if Qwest could ignore its actual performance, the KPMG test could not carry Qwest's checklist burden. KPMG concedes that in conducting tests that covered *every* OSS function, from pre-ordering to maintenance and repair, it relied upon representations and data obtained from CLECs who were receiving preferential "secret deals" treatment from Qwest. Although Qwest's preferential treatment of these CLECs unquestionably skewed the test results and caused Qwest's performance to be overstated, KPMG and the ROC Executive Committee refused even to *consider* the scope and magnitude of the impacts. In these circumstances, the KPMG test results obviously cannot be deemed reliable indicia of Qwest's actual real world performance.

In any event, the results of the KPMG testing, which Qwest cut short in its zeal to file the Application, undermine, rather than support, Qwest's claim of checklist compliance. KPMG's Final Report finds numerous deficiencies in Qwest's OSS in critically important areas. Qwest's current "redesigned" change management process, for example, is still a work in progress. As KPMG found, not only is there far too little evidence to support a finding that Qwest has complied with the change management process, but both of Qwest's test environments are seriously defective. As KPMG recognized in its Final Report, Qwest has an unusually high error rate in manually processing orders. Together, with Qwest's wholly unacceptable order reject rate, these deficiencies substantially impair CLECs' ability to compete by delaying the return of order status notices and the provisioning of service to CLEC customers, while increasing the likelihood of errors in the provisioning of CLEC orders. Qwest's own reported data likewise demonstrate that repeat trouble report rates are higher for CLEC customers than for Qwest's own retail customers. And, as KPMG found, Qwest has also failed to show that it performs repairs for CLECs in a satisfactory manner. In short, Qwest's OSS are plainly discriminatory.

Qwest has not met its burden of demonstrating checklist compliance in a number of other respects as well. With regard to interconnection, Qwest's terms and conditions are blatantly unreasonable and discriminatory. Qwest levies a non-cost-based, wholly unjustified "entrance facility" charge on interconnection that grossly inflates the cost of interconnection and effectively denies CLECs interconnection at their selected point. Qwest imposes large financial penalties on CLECs that fail to meet Qwest's arbitrary 50-percent trunk utilization requirement – a requirement that Qwest itself need not and does not meet. And Qwest restricts efficient interconnection by requiring CLECs to place interconnection traffic on separate trunk groups, and by arbitrarily limiting the length of interconnection trunks. These anticompetitive restrictions severely deter facilities-based entry by driving up the cost of the facilities that CLECs must have to interconnect with Qwest's network.

Qwest further obstructs competitive entry by denying CLECs nondiscriminatory access to unbundled network elements. Qwest retains discretion to refuse to build new facilities to provision CLEC UNE orders, and to delay fulfillment of those orders, when Qwest itself would build the needed facilities if the end-user ordered service directly from Qwest. Qwest also denies CLECs any access to the unbundled network elements, including transport and dark fiber, of Qwest's affiliates, places discriminatory restrictions on a CLECs' ability to combine UNEs with telecommunications services, and unlawfully converts the mistaken calls of CLEC customers for maintenance and repair service into marketing events intended to winback those customers.

With regard to individual network elements, Qwest denies CLECs reasonable access to unbundled local transport by imposing non-distance-sensitive charges that plainly conflict with the Commission's rules. Qwest imposes unlawful restrictions on the availability of unbundled local switching for customers with three or fewer lines in a single location, and limits the availability of packet switching to one degraded form. Qwest also unfairly restricts access to dark fiber, and imposes limitations that effectively deny CLECs any access to the Network

Interface Device. These restrictions all serve to insulate Qwest from meaningful local competition and underscore how far Qwest remains from fully implementing its checklist obligations.

Qwest also falls far short of its burden to establish, based upon record evidence, and not merely paper promises, that Qwest and its separate long distance affiliates, if granted interLATA authority, would comply with the section 272 nondiscrimination requirements that the Commission has recognized are "of crucial importance" in ensuring "a level playing field."[9] Qwest's section 272 declarations consist almost entirely of promises. Indeed, the declarations are virtually identical to Qwest's submissions in Minnesota, where an administrative law judge ruled that Qwest has failed to meet its burden to establish *six* of the fundamental section 272 requirements, including the core requirements that the BOC and its long distance affiliates operate independently, have separate officers and directors, deal with each other only on an arms' length basis, disclose their transactions, treat each other and all other carriers on a nondiscriminatory basis, and comply with joint marketing restrictions.[10] The Application acknowledges past noncompliance with Section 272, and, as detailed below, that section 272 noncompliance is but a small part of a much broader pattern of section 271-related noncompliance. On this record, with both a long history of past noncompliance and the Minnesota findings of *current* noncompliance, Qwest's promises of future compliance, many of which are supported by no documentary evidence, are patently inadequate and provide an "independent ground[] for denying [this] Application." *New York Order* ¶ 402.

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[9] *See* 47 U.S.C. § 271(d)(3)(B); *Texas 271 Order* ¶ 395.

[10] *See Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272), Minnesota Pub. Util. Comm.*, Findings of Fact and Conclusions of Law and Recommendations, PUC Doc. No. P-421/C1-01-1372 (Mar. 14, 2002).

Finally, even if the Commission could rationally find that Qwest has fully implemented its obligations under the competitive checklist, the record here precludes any finding that granting Qwest's application is consistent with the "public interest, convenience and necessity." As the Commission has recognized, granting a BOC request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open and will remain so."[11] As the Commission has likewise recognized, no such finding may be possible if the "BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations," because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations."[12] Although the Commission "will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it has warned the BOCs that it will do so where "a pattern of discriminatory conduct" exists.

Qwest has engaged in just such a widespread and pervasive course of unlawful conduct designed to forestall competition in its local exchange markets at the same time that it provides service across LATA boundaries. The Commission has on at least three occasions *adjudicated* Qwest (or US West before it) responsible for violating Section 271 of the Act, and Qwest continues to violate Section 271. Qwest's current violations are perhaps the most troubling in this context, because they reflect a studied indifference to Qwest's express promises to the Commission in the Qwest/U S West merger proceedings, and thus remove any possible basis for finding that Qwest can be trusted to comply in good faith with its obligations on a going forward basis. As both the merger-related audit of Qwest and the complaint proceedings initiated by

[11] *See SBC Texas 271 Order* ¶ 431; *New York 271 Order* ¶ 444.
[12] *Michigan 271 Order* ¶ 397.

Touch America make clear, Qwest has broken its promise (and statutory obligation) to divest its interLATA customers and business in the U S West region. In particular, Qwest took a number of steps that it concealed from the Commission to ensure that Touch America, the entity it promised to establish as an independent successor to Qwest's in-region long distance customers and business, would remain dependent on Qwest in providing services to divested customers. And, immediately after the "divestiture," Qwest undertook a concerted campaign to reacquire the most valued divested customers and to provide them (and others) with prohibited in-region interLATA services through sham "leasing," "corporate communications" and other arrangements.

As bad as they are, these section 271 violations are just the tip of the anticompetitive iceberg. As detailed below, Qwest has also demonstrated complete disregard for its section 251 and 252 obligations, by, among other things, refusing to file its secret interconnection deals with state commissions as required by section 252 (thereby inhibiting the development of local competition, preventing state commission review, and impairing the state section 271 review process), "freezing" local service accounts to prevent customers from switching to competitive carriers, and refusing to allow CLECs even to test competitive offerings. In short, far more than any previous section 271 applicant, Qwest has exhibited a pattern of activity that removes any possible basis for a finding that Qwest's markets are open and likely to remain so. The record confirms, moreover, that Qwest's UNE rates would make it economically impossible for CLECs to enter in three of the five states even if Qwest could be trusted to reform its anticompetitive behavior, and this provides yet another reason why granting the Application would not serve the public interest.

In sum, careful review of Qwest's 5-state application will confirm that Qwest must do much more to open its local markets to competition – and to disclose and remedy its own ongoing misconduct – before it will qualify for section 271 authority. Qwest urges the Commission simply to ignore the many clear deficiencies and grant Qwest a five-state leap into the long distance business as a reward to Qwest for getting some things, such as aspects of the ROC process, right. The Commission should certainly laud what was done right, but it would be dereliction of the worst sort to ignore what was not.

I. QWEST'S PERVASIVE AND ONGOING SECRET DEALS DISCRIMINATION REQUIRES THAT THE COMMISSION REJECT THESE APPLICATIONS.

Non-discrimination is a bedrock principle of the Communications Act in general, *see MCI Telecommunications Corp v. American Tel. & Tel. Co*, 114 S. Ct. 2223 (1994), and section 271 in particular, *Michigan 271 Order* ¶ 334. In eight separate checklist items, Congress required that the BOC meet its substantive obligation in a nondiscriminatory manner. *See* 47 U.S.C. §§ 271(c)(2)(B)(i) (incorporating the non-discrimination obligations of sections 251(c)(2) and 252(d)(1)), 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii), (xiv) (incorporating the non-discrimination obligations of sections 251(c). Indeed, Congress felt so strongly about this principle with regard to access to network elements that it *doubly* required "nondiscrimination" in Checklist Item 2. *See id.* § 271(c)(2)(B)(ii) (requiring "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," which in turn require both "nondiscriminatory" access to UNEs and "nondiscriminatory" UNE rates).

Congress recognized that – absent broad nondiscrimination requirements – a BOC could effectively avoid its market opening obligations by discriminating in favor of a handful of carriers in return for section 271 support. Although those carriers might (temporarily) be better off, consumers and competition would certainly be worse off. That is because the BOC would predictably extend such favorable terms only to carriers that posed little threat to its core market dominance, and not those carriers that could truly threaten its local monopolies.

There is now overwhelming evidence that Qwest has attempted precisely this gambit. In an effort to create the false appearance that it has opened its local markets to competition, Qwest has promised favorable terms to selected carriers in return for those carriers' promises not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest. These agreements, which blatantly favor some CLECs over others, are a patent violation of Qwest's obligation to provide "access" to its network facilities on terms and conditions that are "nondiscriminatory." 47 U.S.C. § 271(c)(2)(B)(ii).[13] Indeed, it is hard to imagine conduct that goes more directly to the heart of the Act's nondiscrimination requirement.

Moreover, Qwest's secret agreements have a critically important impact on the remaining checklist requirements. Given Qwest's complete failure to disclose to the Commission *any* of the discriminatory terms that appear in its many secret deals, there is no rational basis for the Commission to conclude that Qwest has satisfied the seven other checklist items that, like Checklist Item 2, prohibit discrimination. And because there is substantial evidence demonstrating that Qwest effectively bought the silence of CLECs with respect to proceedings on its section 271 application, the Commission cannot rely on the *absence* of evidence of discrimination or other checklist violations to conclude that *any* of the checklist requirements are satisfied. Indeed, it is now clear that but for the existence of these secret deals, CLECs would have filed additional evidence in state section 271 proceedings demonstrating that Qwest was not satisfying its obligations under the Act. In these circumstances, the only way that the Commission can be sure that Qwest has fully opened its markets to competition and has met its checklist burden is to allow state commissions to conduct comprehensive investigations regarding Qwest's secret deals, to force Qwest to come clean about all of its secret deals and to reform its discriminatory practices, and then to restart the section 271 process with full participation by all interested parties.

The Commission cannot ignore these fundamental violations of the Act's core market opening provisions on the grounds that Qwest has filed a petition seeking a Commission declaration that Qwest's failure to file its secret interconnection agreements with state commissions did not violate section 252. Assuming Qwest had a colorable claim that section 252 could be read, as Qwest argues, to allow Qwest to file only selected passages of negotiated interconnection agreements – and the plain language of section 252 makes plain that this contention is frivolous[14] – the declaratory order proceeding provides no lawful basis for ignoring the mounting secret deals evidence here. Even if the Act could be read as not requiring Qwest to *file* its secret, discriminatory agreements, that would not make Qwest's practice of favoring some CLECs with rate and non-rate terms that are not available to (or even known by) other CLECs any less discriminatory. The secret deals provide dispositive evidence that Qwest does not provide access to network elements (and other checklist items) on nondiscriminatory terms, and there is no possible basis for the Commission to ignore that evidence in this proceeding.

[13] The fact that Qwest provided certain carriers sweetheart deals is also highly probative of whether the rates, terms and conditions it has imposed on the disfavored carriers comply with the Act's *substantive* standards of Checklist Item 2.

[14] Section 252(a)(1) allows Qwest and other incumbent LECs to negotiate agreements for "interconnection, services, or network elements pursuant to section 251," but provides that "[t]he agreement . . . shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1). Section 252(e) provides that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1). *See* Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc., WC Docket No. 02-89, at 6-10 (filed May 29, 2002).

A. The Secret Deals Discrimination Is Undisputed.

It is now beyond dispute that Qwest has entered into blatantly discriminatory agreements with favored CLECs and has kept those agreements secret from state regulators and competitors by failing to file them with state commissions, as required by law. Further, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.

As a result of a six-month investigation into potential anticompetitive conduct, the State of Minnesota Department of Commerce filed a complaint against Qwest with the Minnesota Public Utilities Commission on February 14, 2002.[15] That complaint alleges that Qwest entered into a series of secret, discriminatory agreements with various competitive LECs to provide preferential treatment for those competitive LECs with respect to access to rights of way, reciprocal compensation, and collocation.[16] The Department of Commerce Complaint included as exhibit 11 written agreements between Qwest and various CLECs that Qwest had never filed with the Minnesota Public Utilities Commission pursuant to Section 252(a)(1). The Minnesota Department of Commerce is seeking civil penalties in excess of $50 million against Qwest.[17] The Minnesota PUC has already held one hearing before an ALJ and will conduct further proceedings, scheduled for August 6-8, on additional, newly discovered agreements between Qwest and McLeod before issuing a decision.[18]

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[15] *See, e.g., Second Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission*, Docket No. P-421/C-02-197 (Attachment 2 hereto).

[16] *See* Second Amended Verified Complaint ¶ 24 ("By entering into the Secret Agreements, Qwest is providing discriminatory treatment in favor of the CLECs that are party to these agreements and to the detriment of CLECs that are not"); *id.* at ¶ 26 ("[T]he ongoing and repeated behavior of Qwest in entering into these secret agreements was, and is, anticompetitive and in violation of federal and state law").

[17] *See* Second Amended Verified Complaint ¶¶ 275-77, 282.

[18] Favoring selected CLECs held little risk for Qwest, because if any carrier began to grow beyond "acceptable" boundaries, Qwest could neutralize that carrier's opposition by a pretense of cooperation, holding the carrier to its

Significantly, the Minnesota Department of Commerce has uncovered evidence demonstrating that five of the agreements identified in its Complaint "were the direct result of efforts by Qwest to prevent Eschelon and McLeodUSA – two of Qwest's largest wholesale customers – from participating in consideration of Qwest's application to provide in-region, interLATA long-distance services by the state commissions and the FCC."[19] As a result of these secret agreements to silence Eschelon and McLeodUSA, the Minnesota Department of Commerce noted that "14 states, including Minnesota, have been reviewing Qwest's Section 271 application without the participation of two of Qwest's largest wholesale customers in most of their workshops or adjudicative proceedings."[20] While "[t]he extent of the damage that these agreements have caused with respect to 271 proceedings across Qwest's territory is still unknown," the Minnesota Department of Commerce recently "uncovered information that Qwest has not provided accurate billing or access information for the UNE platform products ordered by Eschelon from Qwest at any time from 2000 through the present."[21] The Department's investigation is continuing.[22]

Upon learning of the Minnesota complaint, several other state commissions in the Qwest region commenced similar investigations of their own. The New Mexico Public Regulatory Commission, for example, has issued over 80 subpoenas to competitive LECs

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promise not to oppose Qwest's section 271 proceedings, but paying only lip service to its own promises of "favorable" treatment.

[19] *See* Comments Of The Minnesota Department of Commerce In Opposition To Qwest's Petition For Declaratory Ruling, WC Docket No. 02-89, at p. 18 (filed May 29, 2002). *See also id.* ("Qwest granted Eschelon various preferences "in exchange for Eschelon agreeing not to participate in consideration of Qwest's Section 271 application before any state commission or the FCC"); *id.* at 20 ("Qwest entered into a similar arrangement with McLeodUSA in exchange for an oral agreement to stay out of the Section 271 proceedings"; noting that McLeodUSA confirmed this in response to a discovery request).

[20] *Id.* at 22.

[21] *Id.* at 22-23.

[22] AT&T is aware, for example, that – prior to their defections from the workshops – Eschelon raised serious problems with Qwest's UNE-P offering and McLeod raised issues with respect to access to poles/duct/conduits and rights of way.

operating in the state, requiring them to produce any and all agreements relating to interconnection that were not previously filed with that commission. Several additional secret agreements were recently produced in response to the subpoenas. The State of Washington has also begun an investigation.[23]

Two states have now issued decisions concluding that Qwest entered into interconnection agreements with individual CLECs that granted them preferential rates, terms and conditions (thereby discriminating against other CLECs) and also violated section 252(a)(1) and applicable state rules by failing to file these agreements with the state commissions. On May 29, 2002, the Iowa Utilities Board (the "IUB") issued a decision concluding that Qwest violated section 252(a)(1) and Section 38.7(4) of the Iowa Code by failing to file three agreements with the Board.[24] The three agreements that the Board examined had been identified by the Minnesota Department of Commerce as involving CLEC operations in Iowa.[25] The Iowa Board concluded that the secret deals presented to it "include interconnection agreement provisions that should have been filed with the Board pursuant to § 252."[26]

The Board further concluded that each of the agreements was discriminatory because it granted preferential rates, terms or conditions to the CLEC. The first agreement was between Qwest and Covad and provided that U S West would commit to meeting several specific interconnection performance standards (including timing, service and quality standards

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[23] *See, e.g.*, Deborah Solomon, *States Probe Qwest's Secret Deals to Expand Long-Distance Service*, Wall Street Journal, Apr. 29, 2002, Section A:1 (col. 5) (2002 WL-WSJ 3393212) (noting investigations in Colorado, Arizona, Oregon, New Mexico, and Utah).

[24] *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2 (May 29, 2002) ("Iowa Order") (Attachment 3 hereto).

[25] Iowa Order at 2.

[26] *Id.* at 9. The Board made clear that this was not a close question with respect to any of the three agreements. *See id.* at 11 ("there can be no serious argument" that the terms of the first agreement "are not properly considered a part of an interconnection agreement"); *id.* at 12 ("there can be no real argument" that the terms of the second agreement

for its firm order commitment ("FOC") process, service intervals, new service failure rate, and facilities problems) not applicable to other carriers, in return for Covad committing to withdraw its opposition to the U S West/Qwest merger.[27] The Board found that "[e]ach of these service quality standards relates to interconnection, would have been of interest to other CLECs negotiating with U S WEST in the relevant time frame, and may still be of interest to other CLECs negotiating with Qwest today."[28]

The second agreement was between Qwest and McLeod and set going-forward rates that McLeod would pay for subscriber list information, amended the existing interconnection agreement to incorporate bill-and-keep in place of reciprocal compensation, and provided that certain interim rates would be treated as final.[29] The Board concluded that this nominal "settlement agreement" plainly "discriminated against other CLECs in favor of McLeod, at least in Minnesota."[30] The Board explained:

> Other CLECs that purchased services for resale apparently began paying higher rates on February 8, 2000, but McLeod was permitted to continue to purchase those same services at the lower interim rates for several more weeks. *It was a form of discrimination to extend this favored treatment to McLeod and not to other CLECs. This discrimination would not have been possible if the agreement had been filed with the various state commissions where it was intended to have effect (all 14 Qwest states).* Because the agreement was not filed in any state, Qwest was able to extend uniquely favorable treatment to McLeod, in return for which McLeod dropped its opposition to the Qwest-U S West merger. Thus, Qwest's failure to file McLeod Agreement No. 1 violated both the letter and the purpose of the statute and the Board's rule.

Id. at 13 (emphasis added).

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are "anything other than an interconnection agreement"); *id.* at 15 ("Qwest's own arguments establish" that the third agreement "is an interconnection agreement that must be filed with the Board").

[27] *Id.* at 9-10. For example, "U S West (and, as a result of the subsequent merger, Qwest) agree[d] to provide 90 percent of Covad's FOC dates within 48 hours of receipt of a service request for regular unbundled loop services and within 72 hours of a service request for DSL-capable, ISDN-capable, and DS-1-capable unbundled loop services." *Id.* at 10.

[28] *Id.* at 10.

[29] *Id.* at 11-12.

[30] *Id.* at 13.

The third agreement – also between Qwest and McLeod – established escalation procedures to facilitate dispute resolution and quarterly executive meetings to resolve issues relating to implementation of the interconnection agreements.[31] The Board concluded that these provisions "are logical and necessary parts of a comprehensive interconnection agreement" and that exempting these "important" provisions from the filing requirement "would undermine the pick-and-choose and nondiscrimination features of the Act."[32]

The Iowa Board further recognized that the three unfiled agreements it examined may be just the tip of the iceberg. It therefore ordered Qwest to "file any other non-filed interconnection agreements with the Board" within 60 days.[33] Last week, Qwest declined its opportunity to request a hearing with respect to the Iowa Board's conclusions. As a result, the tentative decision is now final.

The staff of the Arizona Corporation Commission ("ACC") recently confirmed the obviousness and seriousness of Qwest's unlawful and anticompetitive conduct, concluding that Qwest violated its filing obligations under section 252 by failing to file at least *25* agreements with the ACC.[34] The ACC staff made specific findings that the unfiled agreements are discriminatory:

> It is clear, for instance, through Qwest's own description of what it includes within the terms and conditions of business-to-business arrangements, *i.e.*, dispute resolution, escalation procedures, account team support, and the mechanics of provisioning and billing for ordered interconnection services, that giving favored treatment to one carrier while denying it to another, is the very type of discrimination that the Act attempts to prevent. Without the level of transparency achieved through public filing of these agreements, it would be impossible to ensure that the provisions of the Act were being carried out in a

[31] *Id.* at 14-15.

[32] *Id.* at 15.

[33] *Id.* at 21.

[34] *See Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002) ("Arizona Report") (Attachment 4 hereto).

> nondiscriminatory manner, an important prerequisite to the development of competition in Arizona . . . The Commission cannot determine the nature of, and CLECs cannot pick and choose terms, that are kept secret . . . . Staff believes that this is exactly the type of discrimination that the Act seeks to prevent.

Id. at 15-16.

The Arizona Staff particularly noted the "egregious nature of [Qwest's] infraction" with respect to seven agreements which had provisions "in which CLECs agreed that they would not participate in regulatory proceedings before the FCC," including Section 271 proceedings.[35] The Staff recognized that these agreements attempt to suppress participation by all parties for full development of the record in regulatory proceedings before the Commission are not in the public interest."[36] Arizona "Commission Chairman William Mundell said he was 'shocked and disgusted' when he read the clauses in question. 'It's very troubling that Qwest would have competitors sign interconnection agreements to not participate in the 271 process,' he said. 'Whether it's one (competitor) or 50, the fact that a competitor has to sign an agreement not to participate goes to the heart of the process,' Mundell said."[37]

ACC Staff also recognized that it may not have identified all of Qwest's secret agreements.[38] An ALJ recently heard arguments on whether the ACC should proceed to a full hearing on this matter. And two of the three Arizona commissioners have now properly recognized that the only possible course in light of Qwest's secret deals misconduct is to suspend further consideration of Qwest's section 271 proceeding, pending further investigation: "It is clear to me that continuing with our Section 271 review must be suspended until the Commission

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[35] *Id.* at 1-2, 19.

[36] *Id.* at 1; *see also id.* at 16 ("[P]rovisions in agreements which gave favored treatment in exchange for a party's agreement not to participate in proceedings before this Commission . . . are of extreme concern to the Commission and detrimental to the public interest").

[37] Oscar Abeyta, *Probe Will Slow Qwest's Arizona Call Application*, Tucson Citizen, June 20, 2002, at 1B.

can determine to what extent the agreements in question may have compromised the entire Section 271 review."[39]

In a blatant effort to preempt these ongoing state investigations, and to dodge the Section 271 implications of its pervasive discrimination, Qwest filed a request for a declaratory ruling with the Commission with respect to the scope of its filing obligations under section 252(a)(1).[40] Specifically, Qwest requested "guidance" as to "which types of negotiated contractual arrangements between ILECs and CLECs are subject to the mandatory filing and 90-day state commission pre-approval requirements of Section 252(a)(1) – and which are not." *Id.* at 3. This petition is a frivolous attempt by Qwest to seek cover for its unlawful failure to file secret, discriminatory agreements and to avoid the fatal section 271 consequences of that misconduct. All commenters uniformly opposed Qwest's Petition, and AT&T and other commenters demonstrated that Qwest's proposed narrow construction of section 252(a)(1) flies in the face of the statute's plain language.[41] In addition, several commenters provided additional evidence of Qwest's discriminatory and anticompetitive practices.[42] In short Qwest's Petition for Declaratory Ruling is nothing more than a transparent attempt to derail or distract the enforcement efforts that its own misconduct has spawned.

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[38] *See id.* at 20 n.4 ("These recommendations should also apply to agreements subsequently submitted by CLECs (in response to Staff data requests) which Qwest may not have filed and which Staff determines should have been filed by Qwest under Section 252(e).")

[39] *See* Letter of Commissioner Jim Irvin to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) (Attachment 1 hereto); *see also* Letter of Commissioner Marc Spitzer to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 26, 2002) ("[T]he question I posed in my initial letter must first be answered before the Commission moves forward on the remaining issues regarding Qwest's entry into the long distance market.") (Attachment 5 hereto).

[40] *See Petition For Declaratory Ruling Of Qwest Communications International, Inc.*, WC Docket No. 02-89 (filed Apr. 23, 2002).

[41] *See Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc., WC Docket No. 02-89*, at 6-10 (filed May 29, 2002).

[42] *See* Comments of Touch America, Inc. at 2 n.2, 4-6 & n.4, 9; Comments of PageData.

Regardless of the Commission's ruling on the Section 252 filing requirement issues raised in the declaratory ruling proceeding, Qwest has engaged in blatant discrimination against CLECs, in direct violation of its nondiscrimination obligations under the Act. The Commission cannot lawfully disregard that discrimination in this proceeding.

B. The Secret Deals Foreclose Any Finding That Qwest Has Met Its Checklist Or Public Interest Burdens.

The mounting evidence of Qwest's secret, discriminatory agreements with selected CLECs precludes any finding that Qwest has satisfied its obligation to provide nondiscriminatory access to UNEs as required by Checklist Item 2. Indeed, it is hard to imagine a more blatant example of providing discriminatory access to UNEs. As the Iowa Utilities Board and Arizona Commission Staff concluded, Qwest has given a few CLECs preferential UNE rates and superior access to UNEs to the competitive detriment of all others. Qwest further engaged in a deliberate campaign to keep these deals secret from regulators by requiring the favored CLECs to promise not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest.

This discrimination impedes competitive entry by the disfavored CLECs. Not only do they face an entrenched monopolist that is unwilling to provide them with commercially reasonable access to its bottleneck facilities, but the favored secret deal competitors do not face these overwhelming disadvantages. Whereas the favored CLECs have a Qwest representative to assist them in navigating Qwest's inadequate OSS, other competitive carriers do not. Even where the disfavored competitive carriers can succeed in placing orders, they must pay excessive rates for UNEs and interconnection. This not only puts them at an enormous competitive disadvantage against Qwest, but also against other CLECs that are able to purchase access to

Qwest's network at lower rates.[43] And when the inevitable problems arise in dealing with a supplier that has no interest in the emergence of local competition, most CLECs must resort to costly and time consuming litigation to vindicate their rights under the Act. Those CLECs that are parties to the secret deals, in contrast, were entitled to expedited dispute resolution with Qwest.[44]

The magnitude of this discrimination precludes any finding that Qwest's applications satisfy the public interest. By favoring a few at the expense of the many, Qwest has assured that it will not face ubiquitous, effective competition in any of the applicant states. Granting the applications under these conditions would, by definition, eliminate Qwest's incentives fully to open its local markets and free Qwest to leverage its monopolies to impede long distance competition on the merits.

Even without the direct evidence of Qwest's discriminatory conduct uncovered so far, the Commission could not make a reasoned determination that Qwest has satisfied its nondiscrimination obligations, for two independent reasons. First, the state investigations are ongoing and the full scope and extent of Qwest's discriminatory conduct are not yet known. Indeed, the state commissions are still trying to identify and obtain copies of interconnection agreements that Qwest improperly failed to file (and has not been forthcoming in producing voluntarily, necessitating the use of subpoenas and data requests, as in Iowa, New Mexico, and Arizona). Without the benefit of complete investigative findings from the state commissions, and without any independent analysis of the unfiled agreements (which Qwest has not submitted for Commission review), there can be no finding that Qwest has met any of the eight checklist items that expressly forbid discrimination.

[43] *See Fassett/Mercer Decl.* (discussing Qwest's inflated UNE loop rates); *Chandler/Mercer Decl.* (discussing Qwest's inflated non-loop UNE rates); *Weiss Decl.* (discussing Qwest's inflated non-recurring rates).

Second, wholly apart from the issue of the scope and extent of Qwest's discriminatory conduct and violation of filing requirements, Qwest's secret agreements taint its ability to demonstrate compliance with the other checklist requirements. This is because the evidence demonstrates that Qwest bought the silence of CLECs that may be aware of additional discriminatory conduct by Qwest and have additional information bearing on Qwest's checklist compliance. Indeed, Eschelon has now stated on the record that it was prevented by its secret agreement with Qwest from providing critical evidence regarding Qwest's failure to comply with the Act in state section 271 proceedings.[45] As a consequence, the Commission cannot rely on the *absence* of evidence of discrimination or other checklist violations in the state commission proceedings to conclude that the checklist requirements are satisfied because the record in those proceedings is suspect and incomplete. Nor, because of Qwest's anticompetitive actions, can the Commission rely on the *absence* of evidence of discrimination or other checklist violations in *this* proceeding. Accordingly, unless the Commission conducts an independent investigation of Qwest's compliance with all checklist items, the Commission cannot make a reasoned determination that Qwest has satisfied its nondiscrimination and other checklist obligations. Absent such an independent investigation, any finding by the Commission that Qwest has satisfied the competitive checklist would be reversible error.[46]

The terms of the secret deals uncovered to date also provide conclusive evidence that Qwest has not provided just, reasonable and cost-based UNEs and interconnection to CLECs. In each of the applicant states, Qwest has offered under the table UNE rates well below the rates it

[44] *See Iowa Order* at 14-15.

[45] Letter from J. Jeffrey Oxley, Eschelon, to Bruce Smith, Colorado PUC, Docket No. 02M-260T (filed May 16, 2002) (Attachment 6 hereto).

[46] *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decision is arbitrary and capricious if agency "entirely failed to consider an important aspect of the problem"); *Sprint*

relies upon to support its applications. For example, in a secret agreement with Eschelon, Qwest provided a flat 10 percent discount on all purchases made by Eschelon from Qwest.[47] Eschelon also received a significant per line per month rebate based on Qwest's inability to provide accurate daily usage information.[48] It, of course, would defy common sense to believe that Qwest has voluntarily agreed to UNE rates that are below Qwest's own forward-looking, economic costs of providing the UNEs.[49] Thus, by charging favored CLECs much less for UNEs and interconnection than the rates set by the state regulatory commissions, Qwest has through its own actions demonstrated that those rates are well in excess of TELRIC.

II. QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

Because "access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements (UNEs) under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable," a BOC seeking Section 271 authority must demonstrate that it provides nondiscriminatory access to its OSS.[50] The Commission has repeatedly found that "nondiscriminatory access to OSS is a prerequisite to the development of meaningful local

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Communications Co. v. *FCC*, 274 F.3d 549, 553-56 (D.C. Cir. 2001) (remanding 271 order to Commission for failure to consider clearly relevant factor in granting application).

[47] *See* Second Amended Verified Complaint ¶ 99 (quoting paragraph 3 of *Confidential Amendment to Confidential/Trade Secret Stipulation*, Nov. 15, 2000).

[48] *Id.* at ¶ 110.

[49] *Local Competition Order* ¶ 679 (TELRIC seeks to "replicate[], to the extent possible" the "costs . . . incurred by the incumbents" in providing "interconnection and unbundled elements.") If Qwest were to price UNEs below TELRIC, it would place itself at a significant competitive disadvantage vis-a-vie the competitive carriers obtaining below-cost access to its network.

[50] *New Jersey 271 Order*, App.C ¶ 26.

competition," and that absent such access, CLECs "will be severely disadvantaged, if not precluded altogether, from fairly competing" in the local exchange market.[51]

Qwest falls well short of meeting its obligation to provide nondiscriminatory access. For example, Qwest's current change management process – which has been "redesigned" in recognition of the patent inadequacies of its predecessor – still is not complete, and the "redesigned" CMP is so recent in nature that Qwest cannot establish the "pattern of compliance" with the CMP that the Commission requires of every Section 271 applicant. Moreover, Qwest fails to provide CLECs with a suitable test environment that gives them a meaningful opportunity to compete.

Nor does Qwest provide CLECs with nondiscriminatory access to OSS functions. Qwest's OSS, for example, are plagued by high rates of order rejections and excessive reliance on manual processing of electronically submitted orders. These problems are exacerbated by the manual errors made by Qwest personnel on CLEC orders, which increase the likelihood of errors and delays in provisioning. CLECs cannot even verify whether they are being charged accurately for the (inferior) service that they are receiving from Qwest, since Qwest has not provided them with wholesale bills that can be readily audited and verified.

As described below, Qwest's own performance data – which is the most probative evidence of whether Qwest is meeting its OSS obligations – show that Qwest is not providing parity of OSS to its OSS.[52] Even if such data were unavailable, however, the third-party testing

[51] *See, e.g., New Jersey 271 Order*, App. C ¶ 25; *Georgia/Louisiana 271 Order*, App. D ¶ 25; *New York 271 Order* ¶ 83.

[52] The Commission has consistently held that the most probative evidence that a BOC is providing nondiscriminatory access to its OSS is "actual commercial usage." *New Jersey 271 Order*, App. C ¶ 31; *Georgia/Louisiana 271 Order*, App. D ¶ 31; *Texas 271 Order* ¶ 98; *New York 271 Order* ¶ 89; *Michigan 271 Order* ¶ 138.

of Qwest's OSS by KPMG Consulting ("KPMG") does not support Qwest's claim that it is providing nondiscriminatory access.

The KPMG test is of no real world value because the results were based on input from CLECs that received preferential secret deals treatment from Qwest that is not available to other carriers.[53] KPMG has recognized that reliance on information and representations from "secret deal" CLECs may have skewed its results, but has flatly refused analyze the impact of these agreements on the test results. In these circumstances, the Commission can give no weight to KPMG's finding that Qwest "satisfied" certain evaluation criteria that KPMG used in the test.[54]

Even leaving aside the fact that the results of the KPMG test overstate Qwest's actual performance, those results, in fact, undermine Qwest's claims of compliance with its OSS obligations. KPMG's conclusions make clear that Qwest cannot show that it has adhered to its change management process over time, and or that it has established a suitable test environment. The KPMG report also reveals a number of flaws in Qwest's performance – including errors in manual processing, inadequate provision of status notices, and untimely installations – that deny parity of access to CLECs. Thus, if (as Qwest asserts) the Commission should accord "substantial deference" to KPMG's conclusions (Application at 112), Qwest cannot reasonably be found to be providing nondiscriminatory access.

A. Qwest Has Neither Established, Nor Adhered To, an Adequate Change Management Process.

Adequate change management processes are essential to viable local competition. "Without a change management process in place, a BOC can impose substantial costs on competing carriers simply by making changes to its systems and interfaces without providing adequate testing opportunities and accurate and timely notice and documentation of the

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[53] Finnegan/Connolly/Menezes Decl. ¶¶ 16-17.

changes."[55] Thus, in determining whether a BOC has given CLECs a meaningful opportunity to compete, the Commission "will give substantial consideration to the existence of an adequate change management process and evidence *that the BOC has adhered to this process over time*."[56]

Qwest has neither established, nor complied with, an effective change management process. Because its "redesigned" CMP is in its infancy, Qwest cannot establish that it has "adhered to this process over time." Moreover, as KPMG found in its testing, Qwest has not provided CLECs with a stable testing environment that mirrors, but is separate from, the production environment.

1. Qwest Has Not Shown That It Has Adhered To an Adequate Change Management Process Over Time.

In determining whether a change management plan offers a meaningful opportunity to compete, the Commission evaluates, *inter alia*, "whether the BOC has demonstrated a pattern of compliance with the plan."[57] As the Staff of the Arizona Corporation Commission recently stated, the compliance issue "is critical because it is one thing to have a process that looks good on paper versus a process that works in practice."[58]

Qwest cannot show that it has adhered to its current CMP "over time," or otherwise establish a "pattern of compliance" with that process, because the process is too recent – and not even complete. The current CMP is the result of a "redesign" process that began in July 2001, and continues today.[59] Although most of the provisions of the redesigned CMP have now been

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[54] *Id.* ¶¶ 17-19.

[55] *Georgia/Louisiana 271 Order*, App. D ¶ 41.

[56] *Id.*, App. D ¶ 40; *Texas 271 Order* ¶ 106; *New York 271 Order* ¶ 102 (emphasis added).

[57] *Georgia/Louisiana 271 Order*, App. D ¶ 42.

[58] Filip Decl., Exh. DFL-CMP-10, at 28 (¶ 86) (ACC Staff supplemental report dated May 7, 2002).

[59] In June 2001, Qwest requested that CLECs participate in a process for "redesigning" its change management process (then known as the Co-Provider Industry Change Management Process, or "CICMP") after two separate

agreed to, at least one major issue – voting procedures under the CMP – has still not been resolved.[60] Other provisions were agreed to only within the last few weeks, and some of them have not yet been implemented.[61] The provisions governing the advance notice required for releases, and other critical provisions of the "redesigned" CMP, were implemented only on or after April 1, 2002.[62]

Because the "redesigned" CMP is still in its infancy, Qwest cannot establish that it has adhered to that process "over time." None of Qwest's major releases has been fully implemented under the current provisions of the "redesigned" CMP on an end-to-end basis. Qwest precluded KPMG from conducting such end-to-end testing even on the CMP's newly implemented prioritization and "packaging" processes, by requesting that KPMG conduct no further testing.[63]

Qwest boasts that it "has implemented every aspect of the redesigned [CMP] as soon as it has been agreed upon."[64] Merely implementing a provision of the CMP, however, does not establish compliance with that provision "over time." Moreover, Qwest's description of the percentage of "milestones" that it allegedly has met provides no indication of its compliance with the CMP. In the first place, Qwest has not even fully described the "milestones" that it cites, or

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third-party testers found, and the CLECs demonstrated in Section 271 proceedings, that the CICMP was seriously defective. Finnegan/Connolly/Menezes Decl. ¶ 33-34. Obviously recognizing the flawed nature of the CICMP, Qwest disavows any reliance on the CICMP for any purpose in this proceeding, including the issue of whether it has established a "pattern of compliance." Application at 133-134 n.63, 143 n.69.

[60] Finnegan/Connolly/Menezes Decl. ¶ 36-39.

[61] *Id.* For example, the parties agreed to a manual workaround procedure for the redesigned CMP only on June 17-18, 2002 – after Qwest filed its Application. Other provisions of the CMP, such as the "exception" process for requesting a deviation from the CMP's requirements and a process for posting product or process changes, had been agreed to, but not implemented, at the time of the filing. Finnegan/Connolly/Menezes Decl. ¶ 38.

[62] *Id.* ¶¶ 39.

[63] *See* Finnegan/Connolly/Menezes Decl. ¶ 44. In denying KPMG an opportunity to conduct further testing on an end-to-end basis, Qwest ignored the admonition of the Common Carrier Bureau to Qwest's predecessor, US WEST, that prior to filing a Section 271 application it should allow an independent evaluator to conduct "a review of the BOC's ability to implement at least one significant software release." Letter from Lawrence E. Strickling (Chief, Common Carrier Bureau) to Nancy E. Lubamersky (US WEST) dated September 27, 1999, at 2.

[64] *See* Application at 143-146.

provided the basis for its percentages of "milestones" met. And Qwest has refused to provide back-up data for its "milestones," notwithstanding AT&T's request that it do so.[65]

Furthermore, even based on its limited description, Qwest's "milestones" are plainly an artificial, manipulative attempt by Qwest to establish a pattern of compliance. The "milestones" appear to represent every step that Qwest takes (or is required to take) under the "redesigned" CMP, including tasks that are purely administrative or ministerial in nature.[66] Most of them reveal little, if anything, about the extent of Qwest's compliance with the CMP. For example, one of Qwest's "milestones" – whether Qwest has held regular meetings under the CMP – provides no indication of the actual effectiveness of the meeting itself, or of Qwest's actual conduct at the meetings (including its failure to produce subject matter experts at the meeting who are sufficiently knowledgeable to address particular change requests).[67]

The inability of Qwest to establish compliance with the "redesigned" CMP is confirmed by KPMG's Final Report. KPMG concluded in its report that it was not able to verify whether Qwest adhered to the redesigned CMP, because many of whose provisions were "either too new, or not yet mature enough to evaluate."[68] KPMG based its conclusion on three exceptions that it opened during its test, which found that Qwest was *not* adhering to the provisions of the CMP. KPMG closed each of these exceptions as "unresolved" or "inconclusive" because, as indicated in its report, the various provisions of the CMP that it would have been required to observe for compliance had not yet been adopted, or had been adopted only recently – thereby precluding

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[65] Finnegan/Connolly/Menezes Decl. ¶¶ 50-51.

[66] The "milestones," for example, include whether Qwest holds regular CMP meetings, sends an acknowledgment to an originator of a change request, and posts a change request to its web site. Finnegan/Connolly/Menezes Decl. ¶ 47. Since it appears that Qwest has included every step or action that it takes (or is required to take) under the "redesigned" CMP as a "milestone," it is hardly surprising that Qwest describes "a possible 812 milestones" alone for 127 OSS interface change requests, and "a possible 301 milestones" for 36 product/process change requests. *Id.* ¶ 48.

[67] *Id.*

KPMG from making any assessment.[69] In the case of one exception, which involved the newly adopted prioritization and packaging processes of the CMP, Qwest expressly requested that KPMG conduct no further testing.[70]

Because KPMG issued its report – including its conclusion that it was unable to evaluate Qwest's compliance with the CMP because of its recent nature – only two weeks before Qwest filed its Application, that conclusion should be dispositive here. Apparently recognizing this fact, Qwest argues that the various components of the "redesigned" CMP that KPMG was unable to evaluate "are outside what the [Commission] has required for Section 271 purposes" and "do not have implications for section 271 approval." Application at 146-147. Qwest's argument, however, is flatly contrary to the Commission's precedents.[71]

Like KPMG, Cap Gemini Ernst & Young – which conducted third-party testing of Qwest's OSS in Arizona – concluded in May that "insufficient time has passed since the inauguration of the redesign process to determine whether Qwest has established a pattern of compliance with its redesigned CMP over time."[72] The inability to evaluate Qwest's compliance

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[68] *Id.* ¶ 52 (quoting KPMG Final Report).

[69] *Id.* ¶¶ 52-67.

[70] *Id.* ¶¶ 66-67. Qwest's claim that it "complied with the CMP prioritization procedures" for the IMA 10.0 and 11.0 releases is incorrect. Application at 146. As KPMG found, Qwest improperly bypassed those procedures for both releases by misclassifying certain of its own change requests as regulatory change requests (which resulted in preferential treatment of the requests), over the objections of the CLECs.

[71] For example, although Qwest asserts that the Commission has never required an RBOC to have a change management process for product/process changes, it admits that the "product/process CMP" includes manual processes – which the Commission has included within its definition of "OSS systems" subject to the change management process. *Georgia/Louisiana 271 Order*, App. D ¶ 41; *Ameritech Michigan Order* ¶ 134 (including, within definition of OSS, all "manual functions a BOC has undertaken to provide access to OSS"). Similarly, despite Qwest's assertion that prioritization of regulatory changes is not within the scope of the Commission's review of a CMP, the Commission has not only included changes mandated by regulators within its concept of change management, but has also reviewed prioritization processes as part of its analysis of the adequacy of a change management plan. *See, e.g., Georgia/Louisiana 271 Order*, App. D ¶ 41 (stating that changes subject to change management process include "changes that may be mandated by regulatory authorities"); *id.*, ¶¶ 183-184, 193 and *New York Order* ¶¶ 106, 115, 124-125 (evaluating prioritization process of CMP of Section 271 applicant).

[72] Finnegan/Connolly/Menezes Decl. ¶ 68; Filip Decl., Exh. DLF-CMP-9 at 31.

was cited by the Staff of the Arizona Corporation Commission as a "critical" and "important" exception to its finding that the CMP otherwise met the requirements of Section 271.[73]

2. Qwest Has Not Provided an Adequate Test Environment To CLECs

An important factor in the Commission's analysis of the adequacy of a BOC's change management process is whether the BOC has provided a "stable testing environment that mirrors the production environment and is physically separate from it."[74] Neither of the testing environments offered by Qwest meets this requirement.

Qwest's "Interoperability Environment" is inadequate because, as Qwest admits, it is not separate from the production environment. *See* Application at 136 (Interoperability Environment "uses real production legacy systems"). Furthermore, as Qwest acknowledged last year in its "White Paper" on its Stand-Alone Test Environment ("SATE"), the Interoperability Environment does not mirror the production environment, because responses to CLEC transactions are returned manually even if they would be returned in automated form in the production environment.[75] It was precisely because of these and other deficiencies in the Interoperability Environment that Qwest agreed to develop SATE as an alternative test environment.[76]

SATE, Qwest's alternative test environment, is equally inadequate. First, SATE is not a stable testing environment – which the Commission has defined as an environment where "no changes by the BOC are permitted after the testing period commences." *Texas 271 Order* ¶ 132 n.350; *New York 271 Order* ¶ 109 n.301. Qwest does not "freeze" both the version of a release

[73] Finnegan/Connolly/Menezes Decl. ¶ 68; Filip Decl., Exh. DLF-CMP-10 at 28 (¶ 86).

[74] *Georgia/Louisiana 271 Order* ¶ 187 (quoting *Texas 271 Order* ¶ 132); *see also Georgia/Louisiana 271 Order* ¶ 179.

[75] Finnegan/Connolly/Menezes Decl. ¶¶ 85-90.

[76] When KPMG issued an exception noting these deficiencies in the Interoperability Environment, Qwest responded that it had "no plans to enhance the Interop[erability] environment," but instead would "continue to enhance SATE." Finnegan/Connolly/Menezes Decl. ¶ 88.

in SATE and the implemented version of the release so that changes cannot be made to one without making the same changes to the other. Thus, the test release may differ from the release that is actually implemented.[77]

Second, SATE fails to mirror the production environment. SATE supports only a subset of all of the products and transactions that are available in the production environment. As a result, CLECs cannot test every product that they desire to offer before offering the products in actual commercial production.[78] SATE also fails to mirror the production environment because the responses that it returns to CLECs may be different from those that would be returned in actual production, due primarily to the fact that the databases in SATE contain only some of the data that is in Qwest's actual production systems.[79] Finally, SATE does not support "real world scenario testing" because – unlike the production environment – CLECs using SATE are required to choose a "path" for the response that will determine the time within which it is returned.[80]

Because of these deficiencies, KPMG issued two exceptions, both of which it closed as "unresolved" after Qwest requested that no further testing be conducted. As a result, KPMG found that Qwest did *not* satisfy its evaluation criterion of whether "[a] functional test environment is made available to customers for all supported interfaces."[81]

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[77] Finnegan/Connolly/Menezes Decl. ¶ 92.

[78] *Id.* ¶ 93. SATE has also previously lacked flow-through capability, thus precluding CLECs from determining whether their test orders would flow through in actual production. Although Qwest asserts in its Application that it has now implemented flow-through capability in SATE in all three of its regions, that implementation was completed only on May 20, 2002, and was not tested by KPMG, due to the implementation schedule and Qwest's request that no further testing be conducted. *Id.* ¶ 98.

[79] *Id.* ¶¶ 103,106.

[80] *Id.* ¶ 103.

[81] *Id.* ¶ 100.

Qwest does not dispute that SATE contains these deficiencies, but argues (at 139-41) that they are not "relevant" or "significant."[82] The Commission's precedents, however, do not support Qwest's position. For example, although the Commission held in the *Texas 271 Order* that the lack of flow-through capability in SWBT's test environment did not preclude a finding that the test environment satisfied the requirements of section 271, the Commission based its decision on the "totality of the circumstances." Thus, contrary to Qwest's assertions, the Commission did not unequivocally hold that BOCs are not required to implement flow-through capability in their test environments.[83] Moreover, SWBT's test environment did not suffer from the deficiencies (aside from lack of flow-through capability) in SATE.[84]

Qwest's other attempts to defend the deficiencies in SATE are equally baseless. Contrary to Qwest's assertions, its recent implementation of flow-through capability in SATE will not cure the failure of SATE's responses to mirror responses in the production environment, since the two are entirely different problems. Nor will the implementation of flow-through capability affect the requirement that CLECs choose "paths" for their responses.[85] Finally, Qwest's

[82] Qwest attempts to rely on the data that it has reported under PID PO-19 as evidence that SATE reflects the production environment. Application at 138. However, the data reported by Qwest under this PID provides no basis for Qwest's position, because Qwest has improperly calculated the data by comparing the responses received in SATE with the responses that a CLEC *should* receive in the production environment – not with the responses that a CLEC *did* receive.

[83] *See Texas 271 Order* ¶ 138.

[84] Finnegan/Connolly/Menezes Decl. ¶ 105.

[85] *Id.* ¶ 104. In addition to failing to offer an adequate test environment for pre-ordering, ordering, and provisioning functions (for which the Interoperability Environment and SATE are used), Qwest fails to offer a suitable test environment for maintenance and repair functions. As KPMG found, the testing environment that Qwest offers for its "EB-TA" maintenance and repair interface is deficient because it is not separate from the actual production environment. As a result of this lack of separation, test transactions could invade the production processes and result in erroneous dispatches of technicians. Finnegan/Connolly/Menezes Decl. ¶¶ 115. Qwest's rationalization that it is not required to meet the Commission's criteria for a suitable test environment in the context of maintenance and repair functions is unsupported by Commission precedent. CLECs need a stable test environment that mirrors, but is separate from, production in the context of maintenance and repair interfaces for the same reason that such an environment is needed in the context of pre-ordering and ordering: to ensure that they "are capable of interacting smoothly and effectively with a BOC's OSS," and that their transactions will not "succeed[] in the testing environment but fail[] in production." *See Georgia/Louisiana 271 Order* ¶ 187; *Texas 271 Order* ¶ 132; Finnegan/Connolly/Menezes Decl. ¶¶ 107.

assertion that any differences in responses between SATE and the commercial environment are "intended," but do not "affect a CLEC's ability to test its code" (Application at 139) simply misses the point. Because of the differences in responses as between SATE and the production environment, SATE provides no assurance that the same results will be achieved in the production environment.

Qwest further suggests (at 139-40) that the failure of SATE to reflect the production environment does not adversely affect CLECs, because Qwest's documentation describes any differences between SATE and production, and CLECs may seek elimination of those differences through such procedures as the submission of a change request. Qwest is incorrect. As KPMG has stated, documentation of differences between SATE and actual production "does not substitute for a test environment that mirrors the transactional behavior of the production environment."[86] In addition, requiring CLECs to submit change requests to add products to SATE is not only unreasonable (given the cumbersome and time-consuming procedure involved) but wholly unwarranted, since there is no reason why SATE should differ from actual production.[87]

[86] Finnegan/Connolly/Menezes Decl. ¶ 99.

[87] *Id.* ¶ 101. Qwest cites the recent evaluation of SATE by Hewlett-Packard ("HP") in Arizona as proof that "SATE is adequate to meet the Section 271 requirements." Application at 140-141. The HP evaluation, however, was insufficient to demonstrate that SATE is adequate. HP did not conduct "production mirror testing" of Qwest's IMA Release 9.0, even though HP concluded in a previous evaluation that there were "noteworthy discrepancies related to business rules consistency between the SATE and production systems." Finnegan/Connolly/Menezes Decl. ¶ 109. HP also did not conduct comprehensive testing of the "VICKI" system that Qwest implemented to provide automated responses in SATE, or of the limited flow-through capability that Qwest had implemented in SATE. *Id.* ¶¶ 110-111. If anything, the HP evaluation showed that SATE is *not* adequate, since HP found that it could not conclude that SATE returns consistent messages, in view of the numerous errors that it had observed in the responses. *Id.*

B. Qwest's Interfaces Fail To Provide Nondiscriminatory Access.

In addition to the inadequacy of its change management process, including the absence of a suitable test environment, Qwest does not provide interfaces that provide CLECs with access to OSS functions equivalent to that which Qwest enjoys in its own retail operations.

Pre-Ordering. Qwest does not provide nondiscriminatory access to pre-ordering functions, even though the Commission has stated that "it is critical that a competing carrier be able to accomplish pre-ordering activities in a manner no less efficient and responsive than the incumbent."[88] First, Qwest has not shown that it provides CLECs with the ability to integrate EDI pre-ordering and ordering functions successfully – as it must, in order to meet the requirements of section 271.[89] In contrast to previous (and successful) section 271 applicants, Qwest presents no evidence that real-world CLECs using EDI have attained successful integration. Instead, Qwest simply relies on third-party testing by Hewlett-Packard and letters presented from two companies that design EDI interfaces for CLECs.[90] Such evidence is plainly insufficient. Moreover, HP's test report confirms that a CLEC would find it unreasonably difficult, if not impossible, to integrate EDI pre-ordering and ordering functions successfully.[91]

Second, Qwest fails to provide nondiscriminatory access to loop qualification information, because it fails to provide CLECs with access to its LFACS system and all other databases that contain such information.[92] The "loop qualification tools" that Qwest provides (Application at 115-116) do not provide CLECs with all of the information to which Qwest has

[88] *New Jersey 271 Order* ¶ 33; *Georgia/Louisiana 271 Order*, App. D ¶ 34.

[89] *See, e.g., Georgia/Louisiana 271 Order* ¶ 119.

[90] Application at 116; Finnegan/Connolly/Menezes Decl. ¶¶ 122.

[91] *Id.* ¶¶ 123-124.

[92] When a BOC has compiled loop qualification information for itself, "it is required to provide requesting competitors with nondiscriminatory access to loop information within the same time frame whether it is accessed manually or electronically." *Georgia/Louisiana 271 Order* ¶ 114. That obligation applies whenever "such information exists anywhere in [the BOC's] back office and can be accessed by any of [the BOC's] personnel," regardless of whether the BOC's retail arm has access to that data. *Kansas/Oklahoma Order* ¶ 121.

access, such as information on loop conditioning and spare facilities.[93] Third, Qwest does not provide CLECs with the same ability to perform (or have performed) mechanized loop testing before actual provisioning that Qwest itself has.[94]

Fourth, Qwest has designed its systems to validate addresses using a database (PREMIS) that is different from the database (CRIS) which serves as the source of the service address information on the customer service record ("CSR"). Because CLECs use the service address information on the CSR to populate migration orders, and the address information in PREMIS and CRIS does not always match, CLECs experience order rejections not experienced by Qwest's retail operations.[95]

Finally, Qwest denies parity of access to due dates by changing due dates for CLEC orders far more frequently than for its own retail orders.[96] The higher rate of postponed installations, and the resulting customer dissatisfaction, denies CLECs a meaningful opportunity to compete.[97]

Ordering and Provisioning. Qwest also fails to provide nondiscriminatory access to ordering and provisioning functions. First, Qwest's systems are plagued by high rates of order rejections, manual processing of electronically submitted CLEC orders, and manual errors.[98] Tellingly, Qwest's Application fails to discuss rejection rates, or the percentage of all electronically submitted orders that actually flow through to its service order processor

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[93] Finnegan/Connolly/Menezes Decl. ¶¶ 127-128.

[94] *Id.* ¶¶ 130-135. CLECs need the ability to perform MLTs before a loop is provisioned in order to ensure the accuracy of the loop qualification information to which they have access. Qwest has performed "pre-order" MLTs in its retail operations in the areas where it would operate its "Megabit" service. *See id.*

[95] Finnegan/Connolly/Menezes Decl. ¶¶ 136-138.

[96] *Id.* ¶¶ 139-141.

[97] *Id.* ¶ 141.

[98] Finnegan/Connolly/Menezes Decl. ¶¶ 145-174.

("SOP").[99] Qwest has good reason for its silence. Qwest's systems reject nearly one-third of orders submitted by CLECs using the electronic Qwest interfaces, and those rejections result in delays in the provisioning of service to CLECs' customers, and increase the CLECs' costs.[100]

Qwest's total flow-through rates *(i.e.*, the rate of *all* non-rejected, electronically-submitted LSRs that flow through to the SOP without manual intervention) are equally abysmal. Depending on the type of order and the particular interface used, between 25 and 65 percent of all electronically submitted LSRs in Qwest's region fall out for manual processing.[101] As shown below, the overall rates of manual processing in the five States that are the subject of Qwest's Application ranged from 39.6 percent to 73.1 percent in April 2002.

State	Percentage of Total LSRs Manually Processed (April 2002)
Colorado	45.7%
Idaho	39.6%
Iowa	63.0%
Nebraska	53.1
North Dakota	73.1%

Finnegan/Connolly/Menezes Decl. ¶ 151.[102]

Manual processing, by nature, increases the likelihood of delays and errors in provisioning.[103] And KPMG's third-party testing established that Qwest *does* commit numerous errors in manually processing orders. Qwest, for example, cited human errors and/or inadequate training as a source of various problems noted in 75 exceptions and observations that KPMG

[99] *See id.* ¶¶ 147, 151; Application at 122-123.

[100] *Id.* ¶ 149.

[101] Finnegan/Connolly/Menezes Decl. ¶ 152. Qwest's Application discusses only one of its two measures of flow-through – PO-2B, which measures the percentage of all LSRs that Qwest has designed to flow through that actually flow through to the SOP without manual intervention. Qwest fails to mention the second flow-through measure (PO-2A), which is the rate of *all* electronically-submitted LSRs that flow through to the SOP without manual intervention, regardless of whether they are designed to flow through. *See* Application at 122-123; Finnegan Decl. ¶¶ 150-151.

[102]Qwest cannot validly attribute the high rates of rejection and manual fall-out to "CLEC errors." For example, even if a CLEC follows Qwest's business rules, its orders may be rejected if the rules are inaccurate, unclear, or incomplete. Finnegan/Connolly/Menezes Decl. ¶ 150 n.104. Moreover, beginning with March 2002 data, the flow-through rates reported by Qwest exclude all orders that fall out for manual processing due to CLEC errors. *Id.*

[103] *Id.* ¶ 145.

issued during the ROC test.[104] Despite Qwest's assurance that it had implemented "training and quality assurance measures" to correct the human errors and inadequate training, KPMG continued to find manual errors on approximately 15 percent of the orders that it reviewed, resulting in KPMG's issuance of another observation at the end of May (Observation 3110). Although KPMG found that further retesting was needed, Qwest requested that the observation be closed, rather than allow a retest.[105] KPMG's Final Report thus expressed concerns about the "numerous problems with manually handled orders" during the test, and urged regulators to closely scrutinize Qwest's flow-through performance in light of those problems.[106]

The manual error problems found by KPMG are compounded by the current inability of regulators to monitor the accuracy of Qwest's manual processing on a regular basis. To date, Qwest has not been required to report data on service order accuracy, or on the accuracy of the rejection notices that it sends manually to CLECs, in its performance reports.[107] Although KPMG recommended the adoption of both metrics, Qwest agreed only to develop a PID for service order accuracy – which, as proposed, is patently inadequate because it does not even cover codes that CLECs use on virtually every LSR.[108] Given KPMG's findings regarding the manual error problem, and the lack of established metrics to evaluate the adequacy of Qwest's manual processing performance, Qwest cannot show that it gives CLECs a meaningful opportunity to compete.[109]

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[104] *Id.* ¶ 163.

[105] *Id.* ¶¶ 166-169.

[106] *Id.* ¶ 161.

[107] *Id.* ¶ 171.

[108] *Id.* ¶¶ 172-173.

[109] The self-serving "service order accuracy data" that Qwest includes in its Application provide no reliable basis for concluding that its manual processing of CLEC orders is adequate. *See* Notarianni/Doherty Decl. ¶ 356. Such data were developed unilaterally by Qwest, not under an established PID. Moreover, Qwest has provided no description of the methodology that it used to calculate the data, the volume of LSRs that it used in its calculations, or the field codes that it reviewed. Finnegan/Connolly/Menezes Decl. ¶ 174.

Second, Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete.[110] Both KPMG's test and Qwest's reported performance data show that Qwest is not providing timely jeopardy notices to CLECs on a nondiscriminatory basis.[111] Indeed, Qwest's systems for returning status notices are so flawed that, for some of its orders, AT&T has received a firm order confirmation ("FOC"), followed by a rejection notice – a sequence that should never occur.[112] In other instances, Qwest's systems have returned rejection notices that never should have been issued, because there was no deficiency in the order.[113] These problems put CLECs at a distinct disadvantage with the efficient, fully automated systems that Qwest uses in its retail operations.[114]

Third, Qwest does not provision CLEC orders on a nondiscriminatory basis. KPMG's Final Report, and Qwest's own reported data, show that the provisioning intervals for UNE-P and resale orders are longer than those for Qwest's own retail orders.[115] Qwest has also shown itself unable to provision orders for dark fiber and EELs adequately.[116]

Fourth, Qwest's unreasonably long process for updating customer service codes ("CUS Codes") in customer service records denies CLECs a meaningful opportunity to compete.[117] The

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[110] *See, e.g., New Jersey 271 Order* ¶ 93 (describing timely receipt of status notices as "an important aspect of a competing carrier's ability to serve its customers at the same level of quality as a BOC").

[111] Finnegan/Connolly/Menezes Decl. ¶¶ 179-182.

[112] *See* Finnegan/Connolly/Menezes Decl. ¶¶ 183-187. When AT&T brought this problem to Qwest's attention, Qwest stated that it had sent a rejection notice because it had found an error in the order after it transmitted the FOC. In response to AT&T's complaints, Qwest instituted a "workaround" under which it now manually returns a *jeopardy* notice, rather than a rejection notice, after sending a FOC. This "workaround," however, requires AT&T to expend time and resources to resolve the issues raised by the jeopardy notice, and (like Qwest's previous practice of sending a jeopardy notice) raises the risk of order cancellations. *Id.* ¶¶ 185-187.

[113] *Id.* ¶¶ 188-189.

[114] *Id.* ¶ 189.

[115] *Id.* ¶¶ 190-193.

[116] *Id.* ¶¶ 194-200.

[117] *Id.* ¶ 201-206.

delays in updating CUS codes effectively preclude CLECs from submitting any further orders on a customer's account for days, thereby preventing CLECs from promptly honoring requests for additional services from newly-acquired customers.[118]

Maintenance and Repair. As part of its OSS obligations, Qwest is required to provide access to maintenance and repair functions.[119] Qwest, however, has not done so. For example, repeat trouble report rates for CLEC customers using the UNE-P where no dispatch is required have been higher than those for Qwest's own retail customers.[120] Moreover, as KPMG found, Qwest does not process CLECs' transactions to modify trouble reports in a timely manner; Qwest's rate of successful repairs is inadequate; and Qwest does not maintain accurate repair records for CLECs.[121] Each of these problems denies CLECs a meaningful opportunity to compete.[122]

Billing. Qwest has not provided the nondiscriminatory access to billing functions that CLECs need in order to enable them to provide accurate and timely bills to their customers.[123] Specifically, Qwest has not met its obligation to provide "complete, accurate, and timely" daily usage files ("DUFs") or wholesale bills to CLECs.[124]

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[118] *Id.* ¶¶ 202-204. The delays that are caused by the lengthy CSR updating process appear to have been reduced to some extent by a "workaround" that Qwest implemented (without advising AT&T, which learned of the "workaround" only through happenstance in January 2002). *Id.* The workaround, however, requires AT&T to expend additional time and resources, without any assurance from Qwest that (like other RBOCs) it will implement an automated process that updates CUS Codes in real time. *Id.*.

[119] *Georgia/Louisiana 271 Order*, App. D ¶ 38; *New York 271 Order* ¶ 212.

[120] Finnegan/Connolly/Menezes Decl. ¶ 208

[121] *Id.* ¶¶ 209-211, 214.

[122] *Id.* ¶¶ 208-214.

[123] *See New Jersey 271 Order* ¶ 121; *Georgia/Louisiana Order*, App. D ¶ 39.

[124] *New Jersey 271 Order* ¶ 121.

Qwest's Application makes no attempt to show that its DUFs are accurate and complete. *See* Application at 128 (describing only data on timeliness of DUFs).[125] However, KPMG's test shows that Qwest's systems do not, and cannot, return complete and accurate DUFs. Qwest failed KPMG's test for DUF accuracy and completeness *five separate times* before it finally (and barely) passed on the sixth try.[126] This constant series of failures calls the reliability of Qwest's systems into serious question, particularly since it appears that Qwest has no effective mechanisms to verify DUFs for accuracy and completeness before sending them to CLECs.[127]

AT&T's carrier-to-carrier testing with Qwest in Minnesota showed similarly deficient performance by Qwest. For example, in the second (and final) phase of the test, Qwest failed to return more than 40 percent of the DUFs that it was required to send, and committed errors on more than 30 percent of the access DUFs that AT&T actually received.[128]

Similarly, the wholesale bills that Qwest provides are inadequate to meet the requirements of Section 271. Qwest "must demonstrate that it can produce a readable, auditable and accurate wholesale bill in order to satisfy its nondiscrimination requirements under checklist item 2."[129] Qwest's wholesale bills, however, are not auditable, because they are not provided using the industry standard "CABS BOS/BDT" format – which would "permit[] a wholesale carrier to use computer software to readily audit the data."[130] Instead, Qwest generates wholesale bills in its own proprietary format, using the Customer Record Information System

[125] Qwest's reported monthly performance data do not include data regarding the accuracy and completeness of DUFs. Finnegan/Connolly/Menezes Decl. ¶ 221.

[126] Finnegan/Connolly/Menezes Decl. ¶ 219.

[127] Finnegan/Connolly/Menezes Decl. ¶¶ 219-220. For example, it appears that in each of the tests that it failed, Qwest was totally unaware of the inaccurate and incomplete nature of the DUFs that it was sending to KPMG's pseudo-CLEC until it was advised of the problem by KPMG – including KPMG's first such test, when Qwest was failing to return more than 30 percent of the expected DUFs. *Id.* ¶ 220.

[128] *Id.* ¶¶ 223-224.

[129] *New Jersey 271 Order* ¶ 124; *Pennsylvania 271 Order* ¶ 22.

[130] *New Jersey 271 Order* ¶ 122 n.148.

("CRIS"). Because Qwest uses a non-industry-standard format, CLECs cannot use currently available software to audit the electronic bill.[131] As a practical matter, this renders CLECs unable to audit Qwest's wholesale bills, because attempting to use paper bills to verify the accuracy of Qwest's charges would be prohibitively expensive and time-consuming.[132]

Qwest's wholesale bills are also not accurate. In its Final Report, KPMG noted its "repeated receipt of erroneous bills" from Qwest and concluded that it was unable to determine whether Qwest was adhering to its wholesale billing processes.[133] Qwest's wholesale bills to AT&T have persistently contained errors, most of which have continued to appear in AT&T's bills even after months of discussions between Qwest and AT&T.[134] Finally, Qwest's own reported data on billing accuracy and bill completeness confirm that it falls well short of meeting its obligation to provide nondiscriminatory access.[135]

C. The Performance Data Upon Which Qwest Relies Are Inaccurate.

As this Commission has stated, "the reliability of reported data is critical" and "the credibility of the performance data must be above suspicion."[136] Qwest simply cannot satisfy this requirement.

Contrary to Qwest's claims, the Liberty PMA did not validate the accuracy of Qwest's performance data. During that audit, Liberty assumed that Qwest's raw data inputs were accurate. Based upon that assumption, Liberty then assessed whether Qwest properly applied the

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[131] *Id.* ¶¶ 227-230.

[132] *Id.* ¶ 230. Although Qwest has promised to implement CABS billing for UNE-P ordering on July 1, 2002, it is premature to conclude that Qwest will do so, given its longstanding refusal to do so (even in the face of a regulatory mandate). Finnegan/Connolly/Menezes Decl. ¶¶ 232-234. Even if Qwest implements CABS on July 1, only experience will tell whether the system works properly and enables CLECs to audit Qwest's electronic wholesale bills. *Id.* ¶ 234.

[133] *Id.* ¶ 236.

[134] *Id.* ¶¶ 237-238.

[135] *Id.* ¶ 239.

[136] *Texas 271 Order* ¶¶ 428-429.

business rules governing the metrics when calculating performance results.[137] As a consequence, that audit was never intended to serve as a robust analysis of the integrity of Qwest's data.

Nor can Qwest seek refuge in the Liberty data reconciliation process as proof of the accuracy and reliability of its performance data. The Liberty data reconciliation process was extremely limited in scope and was riddled with so many deficiencies that it could not possibly be characterized as a reliable indicator of the accuracy of Qwest's data.[138] The Liberty data reconciliation involved an examination of data generated more than a year ago by three CLECs for seven measures covering three products. *No* data were examined from three of the states included in Qwest's Application.[139]

The Liberty data reconciliation process was also procedurally and substantively flawed. The study objective inappropriately placed the burden on the CLECs to prove that Qwest's data were inaccurate. Worse yet, Liberty failed to engage in military style testing and prematurely closed observations without determining whether Qwest had eliminated the numerous errors in its performance monitoring and reporting processes that Liberty had identified.[140] However, even Liberty's flawed study reveals that Qwest's performance results are not trustworthy.[141]

Similarly, the KPMG data reconciliation process conducted during the ROC OSS test lends no support to Qwest's claim that its data are accurate and reliable. For a variety of reasons, KPMG was unable to render findings on numerous test criteria. Many of these test criteria were governed by diagnostic measures as to which no parity or benchmark standard has been

[137] Finnegan Performance Data Decl. ¶ 21.
[138] *Id.* ¶ 25-77.
[139] *Id.*
[140] *Id.* ¶¶ 15-31.
[141] *Id.*

developed.[142] As a result, KPMG simply calculated performance results without reaching a determination as to whether Qwest satisfied test criteria or whether any apparent deficiencies in its performance had any competitive impact. With respect to other test criteria, KPMG was unable to render findings because Qwest refused to be subjected to the rigors of additional testing.[143] However, even the KPMG data reconciliation process revealed that Qwest's performance monitoring and reporting processes are plagued with problems due to human error during the manual processing of orders.[144] Thus, if anything, the KPMG data reconciliation undercuts Qwest's claims of data integrity.

Qwest's reliance on the CGE&Y PMA as proof of the reliability of its data is also misplaced. The CGE&Y PMA did not test the accuracy of Qwest's raw data inputs. The test plan for that audit contemplated that the accuracy of Qwest's input data would be evaluated in the Functionality and Capacity test during which Qwest's data would be compared against that collected from the Pseudo-CLEC. However, this aspect of the test was fatally compromised because of the failure of the testers to obtain data from the Pseudo-CLEC. As a result, Qwest's input data were never validated during this audit.[145]

Moreover, even Qwest's inadequate commercial data show that CLECs are subjected to high rejection rates and low flow-through rates which increase the risk of error and provisioning delay. Qwest's own recorded data show that it fails to issue timely status notices and discriminates against CLECs during the provisioning, maintenance and repair and billing processes.[146]

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[142] *Id.* ¶¶ 78-98.
[143] *Id.*
[144] *Id.*
[145] *Id.* ¶¶ 99-108.
[146] *Id.* ¶ 108.

III. QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

Qwest does not come close to satisfying its burden of proving that its UNE rates in each of the five states comply with Checklist Item Two. In four of those states, it is quite obvious that the state commissions failed to apply TELRIC principles. The UNE rates adopted by the Iowa commission, for example, were found to violate the 1996 Act by a federal court because the Iowa state commission openly refused to apply TELRIC principles. The Idaho state commission conceded that the UNE rates relied upon by Qwest in its 271 Application – which were initially adopted in 1997 using 1996 data – are so stale that there could be no finding that they are TELRIC-compliant. The Nebraska state commission simply split the baby and set UNE rates using the discredited Benchmark Cost Proxy Model and severely flawed inputs that reflected Qwest's "actual" costs. And the North Dakota state commission, which last adjudicated the UNE prices in 1997, established only "interim" rates subject to true up upon the completion of a subsequent proceeding, which has not yet taken place. Understandably, Qwest makes only a token effort to defend those rates on the merits.

Instead, Qwest points to eleventh hour unilateral rate reductions in Idaho, Iowa, Nebraska, and North Dakota, and claims that the rates, as reduced, satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state. Setting aside the fact that Qwest's strategy would require this Commission to adopt a new policy of benchmarking, not against rates in states that have already obtained section 271 approval, but against rates in states that are concurrently before the Commission, Qwest's strategy fails.

Qwest's benchmarking analysis fails to account for the numerous additional loop and switching rates that Qwest inserted (or increased) at the same time that it implemented unilateral rate reductions in other states. Qwest's benchmarking analysis continues to reflect high cost exchanges in Idaho, Nebraska and North Dakota that Qwest has sold. And Qwest's benchmarking analysis fails to reflect state-specific usage assumptions. After correcting these clear errors, there is no question that Qwest's rates in at least three of the four states (Iowa, North Dakota and Nebraska) flunk the Commission's benchmarking test, using the Colorado rates as the benchmark – and are indeed as much as 45% higher than Colorado rates, on a fully cost-adjusted basis.

In any event, Qwest's UNE rates could not be found to be TELRIC-compliant in any of the five states, because Qwest's Colorado UNE rates are themselves inflated by myriad clear TELRIC errors. Qwest's NRC cost model contains TELRIC errors that inflate NRCs that are critical for CLEC entry – *e.g.*, hot cut NRCs and basic loop install NRCs – by as much as 1000%. As one example, Qwest's hot cut rate of over $170 is almost five times higher than that recently approved by this Commission in New Jersey (and about $10 higher than obviously inflated hot cut rate that Verizon relied upon its first withdrawn New Jersey application).

Qwest's recurring UNE loop rates also are inflated by clear TELRIC errors. Although the Colorado PUC correctly relied primarily on the HAI Model to compute UNE loop rates, it adopted numerous non-TELRIC-compliant inputs that vastly inflated Qwest's UNE loop rates. The result is a classic case of garbage in, garbage out. These clear TELRIC-errors inflate Qwest's UNE loop costs by more than $2.00.

Likewise, Qwest's Colorado recurring switching rates are substantially overstated. The Colorado PUC initially decided to ignore the evidence submitted in the most recent cost proceeding and to simply maintain Qwest's old patently unlawful switching rates. Recognizing that those massively inflated switching rates would not satisfy Checklist Item Two, Qwest proposed lower switching rates. However, the reduced rates Qwest submitted were based on non-TELRIC-compliant inputs that the Colorado PUC never found to be TELRIC compliant. Rather, the Colorado PUC approved Qwest's proposals solely on the ground that they reduced rates from existing levels.

Finally, even aside from the problems discussed above, there is separate and independent evidence that the UNE rates in Idaho, Iowa and North Dakota violate Checklist Item Two. Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – revenues are not sufficient to cover an efficient new entrant's costs in those states. Moreover, even accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry. Thus, Qwest's UNE rates in Idaho, Iowa, and North Dakota are discriminatory in violation of Checklist Item 2.[147]

A. Qwest's Iowa, Nebraska and North Dakota UNE Rates Do Not Satisfy The Commission's Benchmarking Analysis, Using Colorado As The Benchmark State.

The Idaho, Iowa, North Dakota and Nebraska rates are not remotely TELRIC-compliant. Unable to defend the rates in those states on the merits, Qwest claims that it "adjusted its core UNE rates in Idaho, Iowa, Nebraska and North Dakota in a manner designed to comply with the Commission's benchmarking analysis, using Colorado as the benchmark state." Application at 163. However, as demonstrated in the attached declaration of Michael Lieberman (¶¶ 7-14), Qwest's unilateral rate reductions are not, in fact, sufficient to support a finding of TELRIC-compliance. Rather, even after accounting for Qwest's unilateral rate reductions, Qwest' UNE

[147] As demonstrated below, the fact that Qwest's UNE rates in these states preclude competitive local entry also shows that a grant of Qwest's applications would contravene the public interest.

rates in Iowa, North Dakota and Nebraska are substantially higher than those in Colorado, on a cost adjusted basis.

In large part, Qwest's purported rate reductions are illusory. At the same time that Qwest implemented reductions to some of its UNE rates in these states, Qwest also added numerous new rates to its SGATs.[148] For example, in Nebraska, Qwest unilaterally added a recurring UNE loop rate called "OSS," which increases Qwest's UNE loop rate by $2.52. Similarly, Qwest added new grooming and cost-connect charges in some states at the same time that Qwest purported to reduce its UNE-L loop rates.[149] Qwest's benchmarking analysis does not reflect any of the new recurring loop rates. This omission artificially diminishes the difference in Qwest's UNE rates in Iowa, North Dakota and Nebraska, relative to Colorado, thereby creating the false impression that those rates satisfy the Commission's benchmarking analysis.

There are other serious deficiencies in Qwest's benchmarking analysis. For example, Qwest's benchmarking analysis fails to account for Qwest's recent sales of high cost exchanges in Iowa and North Dakota, which have substantially decreased Qwest's costs in those states relative to Colorado. The USF cost model used by Qwest to compare loop and non-loop costs between states reflects the cost of Qwest's network in 1996. Since then, Qwest has sold several high cost exchanges.[150] Those sales reduced Qwest's costs in Iowa, Nebraska and North Dakota relative to Colorado, and hence those sales have reduced the UNE rate difference that could be justified between those states and Colorado using the Commission's benchmarking analysis.

Qwest's non-loop benchmark analysis also is flawed because it is based on national average "minutes of use." In the *New Jersey 271 Order*, the Commission rejected arguments

[148] *See* Lieberman Decl. ¶ 10.
[149] *See id.*
[150] *See* Lieberman Decl. ¶ 51.

that a benchmarking analysis should be based on national averages, stating that "[w]e . . . disagree . . . that . . . we should use standardized MOU [minutes of use] and traffic assumptions (*i.e.,* demand assumptions) as opposed to state-specific demand assumptions to develop per-line per-month prices as part of the benchmark analysis."[151]

Where, as here, Qwest bears the burden of proving that its rates are TELRIC-compliant, and has access to its own state-specific minutes-of-use statistics, Qwest must use those state-specific numbers in its benchmarking analysis.[152] Otherwise, Qwest would have the unilateral power to determine which minutes of use would be used in the benchmarking analysis. And Qwest obviously would choose (and has chosen) the minutes-of-use statistics that produced the most beneficial results from Qwest's perspective. The Commission already has determined that state-specific data more accurately reflect relative cost and rate differences among states.[153] Having made that finding, the Commission must reject any analysis that fails to implement that approach.

AT&T has conducted a benchmarking analysis that corrects all of the errors in Qwest's flawed approach.[154] That analysis confirms that Iowa, North Dakota and Nebraska all fail the Commission's benchmarking test. Qwest's UNE-platform loop rates in those states are higher than those in Colorado on a cost-adjusted basis, by 12%, 31% and 13%, respectively.[155] Qwest's UNE-L loop rates in those states exceed Colorado's UNE-L loop rates on a cost-adjusted basis by 9%, 35%, and 17%, respectively.[156] And Qwest's non-loop rates in those states exceed those

[151] *New Jersey 271 Order* ¶ 53.

[152] *See id.* (noting that national averages could be appropriate if state-specific figures were unavailable).

[153] See *New Jersey 271 Order* ¶ 53.

[154] *See* Lieberman Decl. ¶ 13-14.

[155] *See* Lieberman ¶ 13.

[156] *See id.*

in Colorado by 4%, 48%, and 12%, respectively.[157] Thus, contrary to Qwest's claims, its UNE rates in Iowa, Nebraska and South Dakota do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.

B. Qwest's Idaho, Iowa, North Dakota And Nebraska UNE Rates Can Not Be Found TELRIC-Compliant On Their Own Merits.

Qwest barely attempts to defend the rates adopted by the Iowa, Idaho, North Dakota and Nebraska state commissions on the merits. That is because the state commission orders confirm that the states did not apply TELRIC principles. Moreover, even if those state commissions had endeavored to apply TELRIC principles (and had succeeded in that endeavor), the cost proceedings in those states generally took place in 1997 and 1998, and relied on even earlier cost data. Since then, Qwest's switching and loop costs have fallen dramatically. Qwest's switching costs have fallen by 15%, 25%, 21% in Idaho, Iowa, and North Dakota, respectively.[158] And Qwest's loop costs have fallen by 22%, 22%, and 8% in each of those states respectively.[159] Thus, even if Qwest's UNE rates in those states were TELRIC-compliant when they were set – which they were not – those rates would not be TELRIC-compliant today.[160]

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[157] *See id.*

[158] *See* Lieberman Decl., Table 6.

[159] *See id.*, Table 4.

[160] Section 271 is framed in the present tense and requires a showing that the UNE rates proposed in the application are cost-based at the time of the application. For example, § 271(c)(2)(A) provides that the relevant inquiry is whether the applicant "*is* providing access and interconnection . . . [that] meets the" checklist requirements. (emphasis added). In addition, checklist item 2 requires that a BOC must provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" of the Act. § 271(B)(ii). Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that *are* just, reasonable, and nondiscriminatory." (emphasis added). Section 252(d)(1) further provides that state commission rate determinations "for network elements . . . *shall be* . . . based on the cost . . . of providing the . . . network element." (emphasis added). *See also* 47 C.F.R. § 51.503(a) ("An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that *are* just, reasonable, and nondiscriminatory") (emphasis added); *id.* at § 51.507(a) ("Element rates shall be structured consistently with the manner in which the costs of providing the elements *are* incurred") (emphasis added). Thus, the fact that Qwest's UNE rates cannot possibly be TELRIC-compliant today confirms Qwest has failed to satisfy Checklist Item Two.

Iowa. The Iowa Utilities Board ("IUB") did not even attempt to set TELRIC-compliant rates.[161] In its Final Decision and Order, the IUB declared that TELRIC violated both state law and section 252(d)(2) of the Act because it required UNE rates based on efficient network design rather than the "actual costs U S West will incur in providing unbundled network elements in the near future."[162] This refusal to apply TELRIC principles is precisely why the inputs adopted by the IUB seek to replicate Qwest's existing costs of UNEs rather than the forward-looking, long run incremental costs.[163]

Any doubt that the rates set by the IUB are not TELRIC-compliant is dispelled by *U S West Communications, Inc. v. Thoms*, Civil No. 97-CV-70082 (S.D. Iowa), Memorandum Opinion, Ruling Granting AT&T's and MCI's Motion for Reconsideration and Order Amending Judgment (Apr. 19, 1999). There, the District Court *vacated* the very findings on which Qwest now relies. The court held that the Board's costing approach in fact violated the TELRIC standard, and thus was "inconsistent with current federal law":

> The Board adopted neither the TELRIC option nor the proxy option in establishing rates for interconnection and access to unbundled elements. *Indeed, the Board specifically rejected the TELRIC methodology because the Board was unwilling to accept two of its underlying assumptions.* *See* Board's Final Decision and Order, at 13-14 (April 23, 1998), as modified by order on June 12, 1998. In its stead, the court [sic] adopted an incremental cost approach. *See id.* at 14-15. *By adopting a pricing methodology other than those specified in the FCC's pricing rules, the Board's pricing approach is inconsistent with current federal law.*

Id. at 4-5 (emphasis added). Accordingly, the court remanded the pricing issues to the IUB, directing it to "comply with the requirements of the FCC's rules." *Id.* at 5. But, as explained in

[161] Baker/Starr/Denney Decl. ¶¶ 22-24.

[162] Final Decision and Order, *US WEST Communications, Inc.*, Docket No. RPU-96-9, at 14-15 (Io. Utils. Bd. issued April 23, 1998) ("*Iowa Pricing Order*"); *see also id.* at 13-14 ("[T]he Board finds it is inappropriate to determine UNE prices using TELRIC methodology because it incorporates two assumptions that are difficult to reconcile with the cost-based pricing requirements of 47 U.S.C. § 252(d)(1) and IOWA CODE § 476.101(4)(a)(1).").

[163] *See id.*

the Baker/Starr/Denny Declaration (¶¶ 35-40), the IUB has yet to comply with the court's remand order.[164]

Idaho. Contrary to Qwest's misleading characterizations, the Idaho Public Utilities Commission ("IPUC") has expressly disclaimed finding the UNE rates that were set in 1997 are TELRIC-compliant. The IPUC explained that it is "unable to determine whether Qwest's UNE prices are consistent with the public interest because Qwest has not established UNE prices for its Idaho services."[165] "There is no evidence showing that Qwest's UNE prices reached through an arbitration that occurred four years ago satisfy current FCC TELRIC pricing requirements, that the arbitrated rates are currently effective because AT&T continues to purchase UNEs from the arbitrated prices, or that the UNEs identified in the interconnection agreement meet the complete list of UNEs now required for pricing."[166] Thus, the IPUC concluded that "[t]he lack of UNE prices for Qwest remains a gap in Qwest's record for compliance with the Section 271 requirements,"[167] and "the Commission cannot conclude that Qwest has satisfied all the FCC requirements for approval of Section 271 interLATA service authority."[168]

Nebraska. Although the Nebraska Public Service Commission ("NPSC") at least has set UNE rates within the last few years, the rates it set do not comply with the Commission's pricing rules. With regard to loops, the NPSC simply avoided the hard issues, and decided to set loop rates on the basis of the three different cost models utilizing the default inputs in those cost

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[164] *See id.*

[165] *Idaho Public Utilities Commission, Commission Decision On Qwest Corporation's Compliance With Section 271 Public Interest And Track A Requirements And Section 272 Standards,* US West Communications, Inc.'s Motion For An Alternative Procedure To Manage Its Section 271 Application, Case No. USW-T-00-3, at 11 (Idaho PUC April 19, 2002) ("*IPUC 271 Order*").

[166] *Id.*

[167] *Id.*

[168] *Id.* at 12.

models.[169] The NPSC reached this conclusion on the basis of its reluctance to make specific findings related to individual inputs, and its belief that any possible bias contained in each model and its associated inputs, would be minimized by averaging the results of the three models.[170]

This explanation is nonsense. To the extent that any of the models used by the NPSC to calculate UNE rates was flawed, averaging those results with TELRIC-compliant models could only result in *excessive*, non-TERIC-compliant rates.[171] And that is precisely what happened. Although the NPSC relied on the results of two forward-looking models (the Commission's Hybrid Cost Proxy Model ("HCPM") and AT&T's HAI model), it averaged those with the excessive rates generated by the now fully discredited Benchmark Cost Proxy Model ("BCPM").[172] Thus, it is only because outlier results from the BCPM were included that the resulting average loop rate of $21.83 set by the NPSC was well in excess of the approximately $15.60 loop rate calculated by both the HCMP and the HAI model.[173]

The other recurring UNE rates set by the NPSC also are flawed. Despite the fact that the Commission had substantially endorsed HAI's switching cost algorithims and interoffice facilities module, *Platform Order* ¶ 75, the NPSC rejected the use of AT&T's HAI model to set switching and interoffice transmission UNE rates, instead relying on Qwest's proprietary model.

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[169] *See id.*

[170] *See id.*

[171] *See id.*

[172] *See id.*

[173] *See id.* Use of the BCPM to set TELRIC rates is foreclosed by the Commission's findings that the BCPM uses an improper standard to calculate outside plant and improper default input values. In its *Platform Order*, 13 FCC Rcd. 21323 (1998), the Commission found that the BCPM's used a "simplist[ic]" approach to "group and serve . . . customers" that "generat[e]d artificial costs." *Id.* ¶ 46. In particular, the Commission found BCPM's methodology flawed because it would "require separate facilities to serve customers that are [in fact] in close proximity." *Id.* Similarly, in determining what approach should be used to "design" the outside plant, the Commission found that the BCPM did not "adhere to sound engineering and forward-looking, cost-minimizing principles." *Id.*¶ 54. Thus, the Commission found that BCPM did not use proper "optimization routines through use of sound network engineering design to use the most cost-effective forward-looking technology." *Id.* ¶ 61. Moreover, the Commission in its *Platform Order* and subsequent *Inputs Order*, 14 FCC Rcd. 20156 (1999) also rejected many of the key default inputs used in the BCPM. *See* Baker/Denny Decl. ¶¶ 39-40.

That model, however, is not appropriately forward-looking.[174] As Qwest openly acknowledged to the NPSC, its model is intended to allow Qwest "recover, in the prices charged to new entrants, the actual real world costs that it incurs to provide interconnection and unbundled network elements."[175]

Moreover, even if the model in fact attempted to calculate the efficient, economic costs of providing switching and interoffice transmission UNEs, the specific inputs used to calculate rates for these UNEs were patently excessive and could not have not produced TELRIC-compliant rates. As one example, the NPSC adopted an inflation factor that was based on hopelessly outdated 1985-1995 data, and that was demonstrably far above those forward-looking inflation factors.[176]

North Dakota. The North Dakota Public Service Commission last adjudicated Qwest's UNE rates in an arbitration in 1997.[177] The PSC established those rates as "interim" only, and "subject to true up upon the completion of the Commission's cost study for U S West" in a subsequent case.[178] Since 1997, however, the PSC has neither completed such a cost study nor established permanent rates to replace the interim rates.[179] Nor has the PSC ever adjusted Qwest's interim rates for UNEs and interconnection to reflect changes in Qwest's costs since 1997.[180]

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[174] Baker/Starr/Denney Decl. Dec. ¶¶ 39-40.

[175] AT&T Post Hearing Br. at 27-28 (Apr. 26, 1999) (quoting testimony of Alan Bergman). *See also id.* ("The cost recovery methodology the Commission adopts in this proceeding must allow [Qwest] to recover its actual costs."). There is no way for Qwest to reconcile these statements with its current claim that the ICM used a properly forward-looking approach.

[176] *See* Baker/Starr/Denny Decl. ¶ 35-54 (describing the inflation factor and describing other non-TELRIC inputs).

[177] *See* Baker/Starr/Denny Decl. ¶ 55.

[178] See *id.* at 6.

[179] *See id.*

[180] *See* Baker/Starr/Denney Decl. ¶ 56.

The 1997 arbitrated rates have violated TELRIC from the outset. In determining the appropriate cost of capital, for example, the PSC accepted U S West's claim it faced "substantial increases in competition and business risk" in the post-1996 competitive environment.[181] The past five years have exposed the hollowness of this claim. The relevant risks are those of Qwest's wholesale business, not its retail local business or its other, riskier ventures. These wholesale risks are low, and are likely to remain low for the foreseeable future.[182] The Commission's 1996 finding that network elements are likely to remain "bottleneck, monopoly services" without "significant competition," *Local Competition Order* ¶ 702, has only been underscored by the subsequent collapse of the CLEC sector.

C. Qwest's Has Failed To Satisfy Its Burden Of Proving That Its Colorado UNE Rates Are TELRIC-Compliant.

Qwest's Colorado UNE rates – which also are the foundation of its benchmarking analysis for the other four applicant states – result from two separate Colorado proceedings. The Colorado PUC initially set permanent Colorado interconnection and UNE rates in a July 28, 1997 order, Docket No. 96S-331T ("331T Order"). Almost one and a half years later, on November 30, 1999, Qwest (then U S WEST Communications, Inc.) filed an SGAT. Qwest's SGAT contained the rates set in the 1997 331T Order, and numerous new rates that had never been reviewed by the Colorado PUC. In response, the Colorado PUC opened Docket No. 99A-577T ("577T Proceeding"). After numerous CLECs, as well as the Colorado Office of the Consumer Counsel ("Colorado OCC") and the Colorado PUC's own staff ("CPUC Staff") opposed the SGAT, the Colorado PUC released a Procedural Order, on December 29, 2000, in the 577T Proceeding, to review the rates in the 331T Order.

[181] *See* Baker/Starr/Denney Decl. ¶ 57.

[182] *See Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 218, 240-241 (D.Del. 2000).

On January 16, 2001, Qwest filed cost studies purporting to support the 331T rates, and the numerous new rates contained in the SGAT. Qwest supplemented that testimony on April 23, 2001. Then, in late July, only two weeks before the scheduled August hearings, Qwest filed a new loop cost study and a new switching cost study, and urged the Commission to adopt loop rates based on those new cost studies or, in the alternative, to incorporate the inputs from those cost studies into the HAI 5.2 cost model ("HAI Model") proposed by the CLECs. The CLECs opposed Qwest's eleventh hour filings of entirely new cost studies and inputs, noting that they could not possibly conduct sufficient discovery to fully analyze and assess Qwest's new proposal. The CLECs also sought to, at least, file rebuttal testimony showing that the new inputs proposed by Qwest were not TELRIC-compliant, and should not be incorporated into the HAI Model. The Colorado PUC denied both CLEC requests. The Colorado PUC held hearings from August 6 through August 17, 2001, and the parties filed closing Statements of Position on September 12, 2001. On December 21, 2001, the Colorado PUC issued the *Colorado Pricing Order*.[183] As explained below, the UNE rates set in that order are fundamentally flawed.

1. Qwest's Colorado NRCs Are Overstated By Clear TELRIC Errors.

The Commission has long recognized that cost-based nonrecurring charges ("NRCs") are critical to making competitive local telephone entry economically feasible.[184] Regardless of the level of the recurring rate, an ILEC will foreclose meaningful competition if it is allowed to increase potential competitors' costs significantly through inflated non-recurring charges. New entrant competitive carriers must pay NRCs up-front, and if NRCs are significantly overstated,

[183] Before the Public Utilities Commission of the State of Colorado, Commission Order, Docket No. 99A-577T (Mailed December 21, 2001) ("Colorado Pricing Order").

[184] *See, e.g., AT&T Communications,* 103 FCC 2d 277, ¶ 37 (1985) ("It is evident that nonrecurring charges can be used as an anticompetitive weapon to . . . discourage competitors"); Second Memorandum Opinion and Order on Reconsideration, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd. 7341, ¶ 43 (1993) ("absent even-handed treatment, nonrecurring reconfiguration charges could constitute a serious barrier to competitive entry").

then potential new entrants will not be able to afford to enter the market. Moreover, higher NRCs increase the level of market risk faced by potential new competitive local exchange market entrants because the high price of entry substantially reduces the potential competitors' pricing flexibility relative to the pricing flexibility enjoyed by the incumbent, which does not have to pay the NRCs.

As explained in the attached declaration of Thomas Weiss, Qwest's Colorado NRCs – which are based on Qwest's "ENRC" cost model – are inflated by numerous clear TELRIC errors. Most notably, the NRC for a "hot cut" is inflated by more than 1000%. For every residential or business customer that a CLEC wins from Qwest, AT&T must now pay Qwest $171.88 to have that customer's line physically transferred, in coordination with Qwest, to AT&T's facilities. Those charges are way out of line when compared to those of other ILECs that have obtained Section 271 approval. For example, Verizon charges hot cut rates of $4.07, in Pennsylvania, and $35 in New Jersey and New York.[185] Qwest's hot cut rates should be no more than $13.[186]

Likewise, Qwest's "basic loop installation" NRC of $55.27 – which applies anytime a CLEC seeks to serve a new customer that is not already served by the ILEC (new customers and customers that request additional lines) – is inflated by almost 600%.[187] Qwest's rate is far higher than in other 271-approved states. In New York, New Jersey, Pennsylvania, and Georgia, Verizon's and BellSouth's corresponding Basic Install rates are only $0.13, $23.15, $3.01, and $34.22 respectively.[188] A truly TELRIC-compliant basic loop install NRC in Colorado is

[185] *See* Weiss Decl. ¶ 39.
[186] *See id.*
[187] *See* Weiss Decl. ¶ 43.
[188] *See* Weiss Decl. ¶ 42.

approximately $0.29.[189] And even Qwest's own cost NRC cost study produces a basic loop install rate of only about $8.00 after correcting for many of the TELRIC violations in that cost study.[190]

The reason that Qwest's NRCs are so overstated is that they were developed using Qwest's ENRC cost model, which contains myriad clear TELRIC errors. These errors include: (1) the improper recovery of disconnect costs at the time when a loop is initially provisioned; (2) recovery of costs for manual work activities that would be performed electronically in a forward-looking network; (3) recovery of costs for activities that are unnecessary in a forward-looking network; (4) recovery of nonrecurring costs that should be recovered through recurring rates; and (5) reliance on improperly computed time estimates for various work activities.[191] Each of these clear TELRIC errors is described in detail in Mr. Weiss' attached declaration.

2. Qwest's Colorado UNE Loops Rates Are Overstated By Clear TELRIC Errors.

The Colorado PUC correctly recognized that the cost model advanced by AT&T – the HAI Model – is capable of producing TELRIC-compliant UNE loop rates. Accordingly, the Colorado PUC stated that it would "look primarily to the HAI Model" to set Qwest's Colorado UNE loop rates.[192] However, the Colorado Commission then adopted non-TELRIC inputs to use in the HAI Model. As explained in the attached declaration of Robert Mercer and Dean Fassett ("Mercer/Fassett Decl."), a cost model is only is good as the input assumptions used. An appropriately designed forward-looking cost model will not produce forward-looking cost estimates if it is not populated with forward-looking inputs.[193] And many of the key input

[189] *See* Weiss Decl. ¶ 42.

[190] *See id.* ¶ 43.

[191] *See* Weiss Decl. ¶¶ 10-36.

[192] *See Colorado Pricing Order* at 38.

[193] *See* Mercer/Fassett Decl. ¶ 13.

values approved by the Colorado PUC, often with little or no explanation, were based upon Qwest proposals that violate fundamental TELRIC principles. As the Colorado Staff explained, "[t]he Qwest approach ignores the most fundamental TELRIC Principle: Existing costs should not be included in wholesale price calculations. Qwest includes these costs, in toto, then uses anti-competitive adjustments as a means of transforming historical costs into future costs."[194] Because the Colorado PUC failed to adopt TELRIC-compliant inputs, Qwest's rates are vastly overstated.

As one example, the Colorado PUC adopted an input for "plant mix" that substantially inflates Qwest's UNE-loop rates. Feeder and distribution facilities may be placed on aerial structures (*e.g.*, supported on telephone poles), underground (placed in conduit that is trenched underground), or buried in trenches (trenched directly into the ground). As a general matter, aerial cable placement is the least expensive – and thus would be used by an efficient competitor wherever possible – followed by buried cable. The most expensive cable placement method is underground cable.[195]

The record in the Colorado UNE pricing proceeding shows that an efficient network owner would deploy about 30 percent aerial cable (and likely more).[196] The Colorado PUC, however, adopted a split-the-baby approach. In particular, the Colorado Commission adopted an input of 20% for the proportion of Qwest's Colorado network that represents aerial cable, which is a rough average of the forward-looking distribution of aerial plant supported by the CLECs

[194] *See* CPUC Staff RRR at 4.

[195] *See* Mercer/Fassett Decl. ¶ 27.

[196] *See* Mercer/Fassett Decl. ¶ 28.

(about 30%) and the portion of aerial cable that exists in Qwest's existing network (about 12%).[197] This clear TELRIC error overstates loop costs by at least $0.80.

To make matters worse, when the Colorado PUC improperly reduced the percentage of aerial plant used in the HAI Model from about 30% to 20%, it allowed Qwest to split the 10% of cable that remained unallocated after this adjustment equally between buried plant and the most expensive structure, underground plant.[198] Even if there was some basis for reducing aerial plant below 30 percent, there is no possible basis for substituting a substantial amount of underground plant; rather, any such substitution would be to the next cheapest solution, buried plant.[199] Thus, at the same time that the Colorado PUC arbitrarily lowered the percentage of aerial cable plant, it arbitrarily increased the percentage of expensive underground cable plant. This clear TELRIC error inflates Qwest's UNE loop rates by an additional $0.48.

As explained in the attached declaration of Robert Mercer and Dean Fassett (¶¶ 36-65), there are numerous other non-TELRIC inputs that substantially inflate Qwest's non-loop UNE rates including: (1) failure to adopt appropriate route distances for distribution cable; (2) massively inflated estimates for the amount of cable required for "drops"; (3) overstated network expense factors; and (4) adoption of substantially overstated rates for plow (in order to bury cable). The combined effect of all of these TELRIC-errors is that Qwest's Colorado UNE loop rates are overstated by at least $2.00 above TELRIC levels.[200]

3. Qwest's Colorado Switching Rates Are Overstated By Clear TELRIC Errors.

In the *Colorado Pricing Order*, the Colorado Commission recognized that the rates in the *331T Order* were stale, and did not reflect did not reflect "the changes in technology, the

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[197] *See* Mercer/Fassett Decl. ¶ 32.

[198] *See Colorado Reconsideration Pricing Order* at 32.

[199] *See* Mercer/Fassett Decl. ¶¶ 34-35.

regulatory field, or the merger of U S WEST with Qwest."[201] However, the Colorado PUC ignored the substantial evidence submitted by AT&T and other CLECs identifying TELRIC-compliant switching rates, and said only that "[t]he record of the 99A-577T does not support a determination by the Commission of final local switching rates."[202] Based on these "findings," the Colorado PUC left the inflated rates set in the 1997 *331T Proceeding* in place on an "interim" basis.

Recognizing that the 331T rates were overstated and would not pass muster in a federal section 271 proceeding, Qwest "voluntarily" reduced those rates. Qwest computed those new rates using the same HAI Model submitted by AT&T and other CLECs in the 577T Proceeding that the Colorado PUC found to be "insufficient," but with different input values. Because Qwest changed the HAI Model's inputs, the new rates proposed by Qwest – although lower than the 331T rates – were substantially higher than those proposed by AT&T and other parties in the 577T Proceeding. The Colorado PUC made no attempt to determine whether this new evidence was sufficient. Instead, the Colorado PUC adopted Qwest's proposed switching rates on the sole ground that they were lower than the stale 331T switching rates that the Colorado PUC had adopted in the *Colorado Pricing Order*, and that lower rates "benefit CLECs."[203]

Simply because Qwest's eleventh hour switching rates are lower than the obviously inflated 331T rates does not make them TELRIC-compliant. On the contrary, Qwest bears the

[200] *See id.*

[201] *See Colorado Pricing Order* at 25-26.

[202] *See id.*

[203] *Colorado Reconsideration Pricing Order* at 7. As pointed out by the CPUC Staff, the "record in [the 577T docket] . . . establishes that Qwest's proposed prices [*i.e.,* the 331T rates] were overstated through inappropriate cost factor calculations, use of incorrect productivity and inflation factors, and lack of inclusion of merger savings, technology improvements and business improvements." CPUC Staff RRR at 3. The structure of Qwest's switching rates "have not had a comprehensive review for over 11 years." CPUC Staff RRR at 5. And Qwest's switching rates are based on "historical costs." CPUC Staff RRR at 5. *see also id.* at 4 ("The Qwest approach ignores the most fundamental TELRIC principle: Existing costs should not be included in wholesale price calculations"). AT&T's cost study showed that the 331T recurring switching rates, were inflated by 277%.

burden of demonstrating that its new switching rates are TELRIC-compliant. Qwest has not done so, nor could it.

Qwest developed its new Colorado switching rates by changing critical inputs to the switching cost study, the HAI Model, submitted by AT&T and other CLECs in the 577T Proceeding. Those changes were never reviewed – let alone approved – by the Colorado PUC, and they produced rates that are substantially inflated above TELRIC levels.

Fill Factor. Qwest's switching cost studies improperly reduced the switching "fill factor" used in the HAI Model from 94% down to 82.5%.[204] According to Qwest, more spare capacity was necessary in order in order to cover increases in demand for switching capacity.[205] That argument is baseless. Today's switches are easily expandable. Accordingly, a proper forward-looking cost model would not invest in more switching and line port capacity than is required to have sufficient capacity to meet small unexpected increases in demand and any necessary administrative functions. Beyond that, as demand grows, it is a simple matter to install additional line port interface circuit boards to serve new subscribers.[206]

Port/Usage Split. Switch rate design has traditionally allocated a portion of switch costs to the fixed line port element and a portion to rates based on minutes of use. In accordance with

[204] The end-office switch fill factor represents the amount of capacity that the cost model assumes will be used by the switch. In the HAI Model, the fill factor determines the number of spare line port interfaces the Model will equip in a given switch. *See* Mercer/Chandler ¶ 25. The difference between the fill factor and 100% represents spare capacity that can be used to serve current and future demand for switched service. Because a small amount of spare capacity is required for administrative and other purposes, the proponents of the HAI Model supported a TELRIC-compliant fill factor is 94%.

[205] *See* Thompson Decl. ¶¶ 59-61.

[206] *See* Mercer/Chandler Decl. ¶ 28. Moreover, the HAI Model is conservatively designed, and implicitly allows for additional spare capacity beyond that reflected in the fill factor. *See id.* Modern switches can serve more than 100,000 lines. *See id.* In Colorado, for example, Qwest operates end office switches that approach this line size (Qwest's Colorado Springs Main wire center serves more than 91,000 lines). *See id.* The HAI Model, however, uses end office inputs that include a default maximum line size that is considerably smaller than 100,000 lines (or the 91,000 that Qwest uses in its network). The value for this input in the HAI Model is 80,000. When the model encounters a wire center serving more than 75,200 business and residential lines (the product of 80,000 x .94), the model adds the investment for a second switch and distributes demand equally between the two switches. Thus, the

TELRIC and the Commission's *Local Competition Order*, rates for unbundled network elements are to be established on a cost causative basis and "costs should be recovered in a manner that reflects the way they are incurred."[207] Under these cost causation principles, the portion of the switch costs that are non-usage-sensitive should be assigned to the flat-rated or fixed line port charge, and the portion of the switch costs that are usage-sensitive should be allocated to the minute-of-use rate element.[208]

The control structure of a modern end-office or tandem switch is a specialized computer.[209] Switching systems have benefited from the same profound improvements in processor performance that have been observed over the past decade in personal computers. As a result, the principal limit to the capacity of today's digital switches is not processing capacity, but rather the number of ports.[210] Given the substantial increases in capacity of today's switches, increased minutes-of-use does not result in increased switching costs.[211]

Indeed, a large portion of the total cost of a switch is associated with memory, processors, administrative and maintenance equipment and is incurred at the time a switch is placed in operation. These "getting started" costs do not vary with usage and accordingly should be assigned to the fixed port rate element. If a switch does exhaust its port capacity, then a wire center must incur the cost of a second switch. The exhaustion of the first switch's ports is the primary cause for incurring the "getting started" costs for the second switch, and these costs

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effective fill factor for the HAI model is actually much lower than 94% (*e.g.*, based on a switch that can serve 100,000, the HAI's effective fill factor is only 72.5%).

[207] *Local Competition Order* ¶ 741.

[208] *See* Mercer/Chandler Decl. ¶¶ 30-38.

[209] *See* Mercer/Chandler Decl. ¶ 32.

[210] *See id.*

[211] *See id.*

should also be assigned to the port. Thus, the majority of the cost of today's generation of digital switches is driven by ports, not by usage, and should be recovered in the fixed port rate element.

The HAI Model submitted by AT&T in Colorado addressed these issues by updating the model to reflect a more realistic 60/40 port/usage split.[212] These values are consistent with the recent finding of the New York Public Service Commission ("NYPSC") in the recent 2002 New York UNE Decision. In that proceeding, Verizon argued for a ratio of 36% fixed/64% usage sensitive claiming that its proposal was based on cost causation and consistent with its general practices. The NYPSC rejected Verizon's arguments and ruled that only 34% of switch costs were usage sensitive and that the remaining 66% should be treated as fixed.[213] The Illinois Commission also has recognized the largely fixed nature of switching costs and has established a 100% flat-rated switch rate with no minute of use element.[214] In fact, more recent data shows that the Illinois was correct.[215] In more recent proceedings, *e.g.*, the Arizona and Minnesota UNE rate proceedings, AT&T is advocating the use of a 100/0 port usage split.

The switching rates approved by the Colorado PUC, do not reflect these forward-looking port/usage ratios. Instead, Qwest's switching rates reflect the old 30/70 port/usage ratio of costs. Qwest provides no legitimate evidence that such a split is appropriate for Colorado.[216] Overall,

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[212] Older versions of the HAI Model, which was originally developed in 1997, used a 30/70 port to usage percentage split. The 30/70 split was based on the telecommunications data that was available at that time. As AT&T and other CLECs demonstrated in the 577T proceeding, however, the 30/70 port to usage split established several years ago is not appropriate for developing rates today, because that distribution of costs does not accurately reflect switch cost causation, as required by TELRIC principles. *See* Mercer/Chandler Decl. ¶ 31.

[213] Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Case No. 98-C-1357, Order on Unbundled Network Element Rates, Before the NYPSC, at 34-36 (January 28, 2002).

[214] *Investigation Into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection*, Network Elements, Transport, Termination of Traffic, Docket Nos. 96-0486 & 96-0569 (con.), 1998 Ill. PUC LEXIS 109 (Ill. Commerce Commission) (Feb. 17, 1998).

[215] *See* Chandler/Mercer Decl. ¶ 34.

[216] The *only evidence* offered by Qwest in support of that ratio is that the Commission's Synthesis Cost Model for computing USF support uses that ratio. But as explained above, the 30/70 port-usage split is outdated and is not supported by the record. Moreover, the Colorado PUC has made no finding that Qwest's 30/70 port/usage split is

the Colorado PUC's misallocation of port to switching costs overstates Qwest's switching usage costs by 75%.[217]

Vertical Features. Qwest's switching port rates, which are based on the HAI Model, reflect a $0.38 add-on cost for vertical feature software.[218] Because the switch costs used in the HAI Model already account for vertical feature software costs, *see* Mercer/Chandler Decl. ¶ 40, this is a clear double count. By adding the $0.38 vertical features software costs to the port rates computed by the HAI Model ($1.15), as Qwest did to calculate its switching rates, Qwest substantially inflated the switching port rate.[219]

D. Qwest's UNE Rates Create A Discriminatory "Price Squeeze" In Violation Of Checklist Item 2.

Section 271 bars the Commission from granting Verizon long distance authority unless the Commission finds that the UNE rates are "nondiscriminatory" as well as cost-based.[220] The Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the

appropriate for Colorado. Rather, the Colorado PUC adopted Qwest's rates on the basis of a logical non-sequitor – that Qwest's rates were lower than the massively overstated 331T rates.

[217] *See* Mercer/Chandler Decl. ¶ 37. The Commission's *Maine 271 Order* is not to the contrary. In the *Maine 271 Order*, the Commission determined that the Maine Commission's decision to use a 30/70 split was reasonable because: (1) the Maine Commission has discretion to determine the proper split based on the record evidence and (2) AT&T objected to the 30/70 split for the first time in opposition to Verizon's Maine Section 271 application. *See Maine 271 Order* ¶¶ 29-30. Neither of these factors exist here. The Maine commission at least addressed the appropriate port/usage split, the Colorado PUC did not. Rather, as noted above, the Colorado PUC adopted Qwest's proposed switching rates without any investigation because those rates were lower than the massively overstated 331T rates. Likewise, in contrast to the Maine state UNE rate proceeding, in which AT&T did not object to the 30/70 port/usage split, AT&T filed extensive cost studies in Colorado supporting the use of a 60/40 port/usage split. *See* Mercer/Chandler Decl. ¶ 34. And that testimony was unopposed. It was not until Qwest sought reconsideration of the *Colorado Pricing Order*, that it challenged the use of a 60/40 split.

[218] Vertical features are additional telephone related services such as Caller ID, Call Waiting, Call Forwarding, voice mail, and so on.

[219] Mercer/Chandler Dec. ¶ 40.

[220] *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A).

utility's retail services to any class of customers.[221] Thus, if Qwest's high end UNE rates foreclose UNE purchasers from economically providing residential competition, Qwest is engaged in "discrimination" and has not satisfied checklist item two. And because Section 271 categorically bars long distance authorization unless checklist item two has been "fully implemented," to the extent that Qwest's UNE rates in any state are discriminatory, the Application must be denied.

The Commission recently offered guidance on the type of "margin analysis" that should be employed to test whether a BOC's rates are, in fact, discriminatory. The Commission explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis including, intraLATA toll and interLATA toll revenue contributions, and the amount of federal and state universal service revenues that would be available to new entrants.[222] The Commission also stated that a margin analysis should consider whether entry is viable using a mix of a UNE-based and resale-based local entry strategy.[223]

AT&T has conducted such an analysis and it demonstrates that a residential entry strategy that employs combination of UNE-based and facilities-based entry (the analysis assumes that a UNE-based approach where that is the most profitable entry mode, and a resale-based approach where that is the most profitable mode of entry) is *not* economically feasible in Idaho, Iowa or North Dakota. State-wide average *gross* margins (not accounting for carriers' internal costs) in those states are only $5.55 (for Idaho), $4.24 (for Iowa), and $5.19 (for North Dakota).

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[221] *FPC v. Conway Corp.*, 426 U.S. 271, 278-79 (1976).
[222] *See, e.g., Vermont 271 Order* ¶ 71.
[223] *See id.* ¶ 69.

Those margins do not even come close to covering an efficient carrier's internal costs of entry.[224] As demonstrated in the attached declaration of Stephen Bickley, an efficient new entrant's internal costs exceed $10.00 in each of these states.[225] After accounting for these internal costs of entry, the *net* margins that are available to new entrants in Iowa, Idaho, and North Dakota are *negative*. Thus, competitive entry is not feasible in any of these states, which confirms that Qwest's UNE rates in these states are discriminatory in violation of Checklist Item 2.

IV. QWEST DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND RESALE

Qwest's joint application is deficient in a host of additional and important respects. It is plain, in most cases from the face of Qwest's SGATs, that Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, all in violation of its checklist obligations. Certain state commissions in Qwest's region have acknowledged a number of these violations and forced Qwest to reform its policies in those states. Qwest's continuing failure uniformly and fully to comply with its market-opening obligations under the Act requires denial of its application.

A. Qwest Denies CLECs Nondiscriminatory Interconnection.

Section 271(c)(2)(B)(i) requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. §

[224] Qwest also filed a margin analysis. But as explained in the attached declaration of Michael Lieberman, that analysis is fundamentally flawed because it fails to account for numerous recurring costs that appear in Qwest's SGAT's. *See* Lieberman Decl. ¶¶ 46-49. Those costs include OSS costs and DUF costs. Qwest's margin analysis also fails to use state-specific minutes-of-use assumptions as required by the Commission's rules. *See id.*

[225] In the past, the Commission has questioned whether the well-known internal cost estimate is that of an efficient carrier. The answer to that question is yes. As explained by Mr. Bickley, that internal cost figure does not reflect carriers' *current* internal costs, but their forward-looking costs that accounts for future savings associated with efficiencies and increased scale. *See* Bickley Decl. ¶¶ 1-2.

271(c)(2)(B)(i).[226] Section 251(c) contains three requirements for the provision of interconnection. First, an ILEC must provide interconnection "at any technically feasible point within the carrier's network."[227] Second, an ILEC must provide interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself."[228] Finally, the ILEC must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252."[229]

Qwest violates each of these requirements in each of the five joint-application states. In all five states, Qwest imposes unreasonable and non-cost-based "entrance facility" charges on CLECs that wish to interconnect at a Qwest tandem or end office switch and thus drives up the cost of interconnection. Also in all five states, Qwest imposes substantial and discriminatory financial penalties on CLECs that fail to meet Qwest's arbitrary 50 percent trunk utilization requirement – a requirement Qwest itself does not meet and for which Qwest suffers no comparable consequences. In all states but Colorado, Qwest further restricts efficient interconnection by barring CLECs from placing interconnection traffic on existing trunk groups that carry interLATA toll traffic. And in all states, Qwest bars CLECs from placing interconnection traffic on private lines and arbitrarily limits the length of interconnection trunks to 50 miles. Each of these restrictions has the anticompetitive effects of deterring and delaying

226 Section 251(c)(2) imposes a duty on ILECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2)(A). The Commission has concluded that "interconnection" in section 252(c)(2) refers "only to the physical linking of two networks for the mutual exchange of traffic,... and not the transport and termination of traffic." *Local Competition First Report and Order* ¶ 176.

227 47 U.S.C. § 251(c)(2)(B). *See also* 47 C.F.R. § 51.305 (requiring interconnection "[a]t any technically feasible point"). In its *Local Competition First Report and Order*, the Commission identified a minimum set of technically feasible points of interconnection. *See Local Competition First Report and Order* ¶¶ 26, 210, 47 C.F.R. § 51.305(a)(2).

228 47 U.S.C. § 251(c)(2)(C).

facilities-based entry by driving up the cost of using facilities to interconnect with Qwest's network.

1. Qwest's "Entrance Facility" Charge Denies CLECs Reasonable Access To CLEC-Selected Points Of Interconnection ("POI").

Qwest's SGATs in all five states impose unlawful "entrance facility" charges on CLECs obtaining interconnection trunks from Qwest. There is no sound economic or engineering reason why Qwest should levy an "entrance facility" charge, which is essentially a loop charge, for these interconnection trunks, and such charges are therefore anticompetitive and inconsistent with the Commission's rules.[230]

When a CLEC wishes to establish interconnection between its switch and a Qwest switch, Qwest's SGATs deem *any* Qwest-provided transport between the CLEC switch (or other POI) and the nearest Qwest wire center (called the "serving wire center" or SWC) to be an "entrance facility." Whenever a CLEC wishes to establish a connection from its own switch to a Qwest switch using interconnection trunking provided by Qwest, Qwest requires the CLEC to purchase an "entrance facility" from the CLEC switch to the nearest Qwest serving wire center.[231] These "entrance facilities" are considered to be "high speed digital loops" and are priced as such – *i.e.*, the charges for entrance facilities are flat-rated and *non*-distance-sensitive. If the CLEC wishes to establish interconnection with a Qwest switch other than the nearest Qwest switch, Qwest forces the CLEC to purchase both the entrance facility (to the Qwest SWC) and what it calls "direct trunked transport" between Qwest switches (*i.e.*, from the serving wire

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[229] *Id.* § 251(c)(2)(D).

[230] *See* 47 U.S.C. §§ 251(c)(2), 252(d)(2); 47 C.F.R. § 51.705.

[231] *See* SGAT § 7.1.2.1.

center to the CLEC's desired Qwest switch). Direct Trunked Transport is a flat-rated, distance-sensitive charge.[232]

Qwest's "entrance facility" charges are unlawful because they do not reflect the way these costs are incurred. There is no economic or engineering difference whatsoever between the "entrance facility" – the transport link between the CLEC's switch and the SWC – and the "direct trunked transport" – the second link between Qwest's wire centers. Accordingly, there is no justification for creating separate "entrance facility" and "direct trunked transport" charges. Qwest has improperly borrowed the "entrance facility" concept from the context of access charges; in that context, entrance facilities are priced like loops and were originally designed to function as subsidy elements.[233]

The principal effect of these "entrance facility" charges is dramatically to raise the price of interconnection, because the CLEC switch is often in close proximity to the Qwest "SWC." The CLEC should be able to obtain "Direct Trunked Transport," without need for any entrance facilities or other costs, continuously from the CLEC switch to the Qwest switch, whether a tandem or directly to an end office. Wilson Dec. ¶ 11. The CLEC should not be required to order an additional entrance facility, which only serves to raise the cost of interconnection, in violation of sections 251(c)(2) and 252(d)(2).[234]

The Colorado Hearing Examiner's resolution of this issue was in error. As the Hearing Examiner saw it, the issue was "whether Qwest must extend its network to accommodate a

[232] *See* Wilson Dec. ¶¶ 8-9; Freeberg Interconnection Dec. at ¶ 18 n.10.

[233] Wilson Dec. ¶ 10.

[234] Although the SGATs state that CLECs may request other technically feasible means of interconnection, which Qwest will consider through the Bona Fide Request process (*see* SGAT § 7.1.1), this provision has nothing to do with Qwest's classification of facilities between the CLEC switch and the Qwest SWC as "entrance facilities," which Qwest insists on pricing as if the CLEC had ordered a loop. In other words, although CLECs may request other technically feasible physical arrangements for interconnection, it would still be the case that any Qwest-provided trunking between the CLEC switch and the nearest Qwest switch would be deemed an "entrance facility." Wilson Dec. ¶ 12.

CLEC's requested point of interconnection."[235] In fact, the issue has nothing to do with whether Qwest must "extend its network" anywhere; the issue is the pricing of these trunks, and whether Qwest is entitled to tack a gratuitous loop charge on top of its distance-sensitive transport rates. Sections 251(c)(2) and 252(d)(2) preclude such a rate structure, and therefore Qwest has failed to satisfy this checklist item.

2. Qwest's Interconnection Arrangements Discriminate Against CLECs And Provide CLECs With Interconnection Arrangements Inferior To Those Qwest Provides For Its Own Connections.

Qwest's trunk forecasting requirements are discriminatory and unreasonable in violation of Qwest's interconnection obligations. First, if a CLEC forecasts a need for more trunks than Qwest *thinks* the CLEC will need, Qwest forces the CLEC to pay a construction deposit, which will not be returned if the CLEC's utilization falls below a certain threshold. To make matters worse, Qwest reserves the unilateral right to "snatch back" trunks if the CLEC's utilization of a trunk falls below 50 percent, and thus forces CLECs to incur the substantial non-recurring costs of reordering new trunks if the CLEC's traffic subsequently increases. These provisions are anticompetitive, unreasonable, and discriminatory.

Under Qwest's SGATs (§ 7.2.2.8.6), both the CLEC and Qwest forecast the trunking that will be necessary for interconnection between those two carriers in each coming quarter. Qwest's forecasts are invariably lower than the CLEC's. If the CLEC's utilization has been below 50% in the previous 18 months, and the CLEC's forecasts are higher, the CLEC must pay Qwest a deposit in order to obtain the full amount of trunking that it thinks it will need. If the CLEC's utilization does not reach 50 percent of the CLEC's forecast within 6 months, however, the CLEC loses its deposit (in whole or in part). *See* SGAT § 7.2.2.8.6.1.

[235] *Colorado Interconnection Order* at 27.

These provisions are unreasonable and discriminatory. The Commission has noted that "the requirement to provide interconnection on terms and conditions that are 'just, reasonable, and nondiscriminatory' means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations."[236] Under section 251(c)(2)(C), the interconnection arrangements provided to CLECs must also be "equal in quality" to the connections an ILEC provides for itself, meaning that an ILEC must provide connections between its network and that of a requesting carrier "that is at least indistinguishable from that which the incumbent provides itself."[237] The Commission expressly included the probability of trunk blocking when defining this standard.[238]

The forecasts at issue in SGAT § 7.2.2.8.6 are made by both Qwest and the CLEC because each company is trying to predict what trunk capacity is needed so that no call blocking will occur.[239] Qwest argues that it has the right to impose the deposit requirement "to give CLECs an incentive to provide accurate forecasts,"[240] ignoring the fact that CLECs have no incentive to install, maintain and pay for a vast number of underutilized trunks to Qwest end offices, given that such policies cost the CLEC just as much in switch terminations as they do Qwest. Moreover, Qwest's requirement puts a CLEC in the position of choosing between risking a Qwest-imposed financial penalty if it over-estimates its trunk utilization or risking

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[236] *NJ 271 Order*, App. C., ¶ 19; *see also Local Competition Order* ¶ 218.

[237] *Local Competition Order* ¶ 224.

[238] "Trunk group blockage indicates that end users are experiencing difficulty completing or receiving calls, which may have a direct impact on the customer's perception of a competitive LEC's service quality." *NJ 271 Order*, App. C., ¶ 18 n.635.

[239] *See* Wilson Decl. ¶ 15.

[240] Freeberg Interconnection Decl., ¶ 118.

customer-affecting blockage if it under-estimates utilization. Both options risk competitive impacts, and Qwest cannot be allowed to impose that choice on CLECs.[241]

Qwest, of course, faces no such choice. Indeed, Qwest's own trunk utilization in recent months has been consistently *below* 50 percent.[242] In violation of the requirement that CLECs be given parity treatment by an ILEC, Qwest does not hold itself to the 50 percent utilization standard it imposes on CLECs.

Compounding the inherent inequity of Qwest's insistence that a CLEC maintain a trunk utilization efficiency greater than Qwest itself can manage is the fact that it is generally more difficult for CLECs, with their much smaller networks, to achieve utilization levels equal to or greater than those of an entrenched incumbent.[243] CLECs generally have smaller amounts of traffic than an ILEC, and that traffic is subject to more and greater variability, because the CLECs' customer bases change more rapidly than Qwest's.[244] Thus, from an engineering management perspective, it is unreasonable to expect CLECs to achieve utilization levels higher than those of Qwest.[245]

The practical effect of these provisions is that CLECs scale back their facilities-based market entry to prevent excess blocking. When interconnection trunks are maintained at utilization levels that are high, there is the risk of excessive call blocking, to and from the Qwest network. If too many customers, or even one large customer, is put on the CLEC network without considering the trunking that is needed to carry the calls, excessive blocking will result in the interconnection trunks. AT&T will literally delay putting customers on their network, and

[241] *See* Wilson Dec. ¶ 20.
[242] *See* Wilson Decl. ¶ 16.
[243] *See* Wilson Decl. ¶ 17.
[244] Id.
[245] *Id.*

will carefully manage when it adds traffic to the network, to prevent blocking that can be caused by Qwest's unreasonable and costly limitations. Qwest's construction deposit provisions are therefore unnecessary and blatantly anticompetitive.[246]

In a further derogation of its interconnection obligations, Qwest's SGATs provide that Qwest may unilaterally determine that a CLEC is underutilizing its trunks and snatch trunks back from the CLEC regardless of the CLEC's needs or plans for the trunks it holds and for which it pays.[247] Of course, CLECs have no economic incentive to install, maintain and pay for any significant number of underutilized trunks, and CLECs are obviously in the best position to project their future needs for interconnection trunks. Only the CLEC should determine if it is appropriate to return underutilized trunks to Qwest. There is no reason why Qwest should have the authority unilaterally to determine whether a competitor may retain the trunks it is using.[248] This policy effectively forces the CLEC to re-order the trunks later, and pay Qwest's sizeable nonrecurring costs a second time.

In short, Qwest's SGATs make Qwest the overseer of a CLEC's trunk-utilization, with the right (1) to determine unilaterally that the CLEC is not using its trunks according to utilization demands that Qwest does not meet itself and (2) to take back the trunks that Qwest wants, regardless of a CLEC's own projections and plans. This gives Qwest unprecedented and unreasonable power to disrupt its competitors' entry plans and conduct of their business. Such discriminatory treatment cannot be permissible under the interconnection requirements of the Act.

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[246] Wilson Dec. ¶ 20.

[247] *See* Wilson Decl. ¶ 22; *see also* SGAT § 7.2.2.8.13.

[248] Qwest's snatch back policy is also unreasonable in that it is much easier and more efficient for Qwest to internally manage and resize Qwest network trunks than it is to snatch back trunks from CLECs and then force a CLEC to re-acquire the trunks to accommodate its growth. *See* Wilson Decl. ¶ 24.

3. Qwest Unlawfully Requires CLECs To Place Interconnection Traffic On Separate Trunk Groups.

Qwest's SGATs in Iowa, Idaho, Nebraska, and North Dakota (§ 7.2.2.9.3.2) prohibit CLECs from placing interconnection traffic on the trunk groups they have already established to carry toll traffic. And all of Qwest's SGATs (§ 7.3.1.1.2) effectively prevent CLECs from placing interconnection traffic on spare private line facilities, by charging CLECs private line rates for all trunks associated with a given facility, even if some trunks are available to carry interconnection traffic. These restrictions prevent CLECs from efficiently using their existing, spare trunk capacity for interconnection, and further drive up the costs of interconnection with Qwest.

Interexchange carriers such as AT&T have existing switched access trunk groups to Qwest switches that carry interstate long distance traffic. It would be efficient for AT&T to use these same trunk groups to carry local traffic as well. Instead, Qwest demands that CLECs use one set of trunk groups for interLATA calls and another set of trunk groups for local and intraLATA calls. This requirement increases the number of trunks, increases the cost of interconnection, and squanders available trunk resources. Indeed, it requires CLECs to establish two parallel trunks groups, each of which is operated at sub-optimal utilization, when one trunk group would suffice. And it makes it all the more difficult for CLECs to comply with Qwest's artificial utilization requirements.

There are no legitimate grounds for Qwest's separate trunk requirement. It is technically feasible to place interconnection traffic on interLATA trunk groups. AT&T has done so for years in those states (such as Arizona and Washington) that have refused to let Qwest put up this barrier. In those states, AT&T provides Qwest with a Percent Local Usage ("PLU") factor to permit appropriate billing. And Qwest remains free to track CLEC usage through its switch records and bill the CLEC accordingly. For these reasons, Colorado has now required Qwest to permit AT&T to place interconnection traffic on its interLATA trunks. In the remaining four joint-application states, however, the restriction persists.[249]

There is also no good reason for Qwest to prevent CLECs from using spare private line facilities for interconnection. CLECs buy special access or private line facilities from Qwest to reach end user customers. These same facilities can efficiently carry interconnection traffic, and proportional pricing can be used to appropriately charge the CLEC for the two types of traffic. Indeed, that is precisely what the Washington PUC has now required Qwest to provide. By charging CLECs private line rates for the complete facility, including those spare trunks that are available for interconnection traffic and could otherwise be billed under the reciprocal compensation requirements, Qwest again effectively forces CLECs to build separate trunk groups for interconnection.

By forcing CLECs to build separate trunk groups to carry interconnection traffic, Qwest forces CLECs to overbuild their networks at a time when CLECs can least afford to do so, thereby substantially raising the cost of entry and deterring facilities-based competition. Qwest's unlawful, and discriminatory conduct is particularly anticompetitive because Qwest faces no such restrictions today or in the future. Qwest will not build duplicate networks for local traffic as opposed to private line or interLATA use. It should not be permitted to deter competition by foisting such a costly and wasteful network-design requirement upon its competitors.[250]

4. Qwest's Length Limitation On Interconnection Trunks Is Unlawful.

Qwest's SGATs also arbitrarily limit the length of interconnection trunks between Qwest switches to 50 miles. In other words, when a CLEC wishes to purchase interconnection trunks

[249] *See* Wilson Decl. ¶ 28.

[250] *See* Wilson Dec. ¶¶ 29-32.

that would involve transport of more than 50 miles between Qwest switches, and Qwest lacks adequate capacity on such a route, Qwest requires the CLEC to build the additional capacity for Qwest. There is no legitimate justification for this anticompetitive, cost-raising requirement.

It is Qwest's obligation to "provide ... interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access."[251] Thus, when a CLEC has chosen its own switch as its point of interconnection with Qwest, it is Qwest's responsibility to deliver the traffic to the chosen destination once that traffic has been handed off to Qwest. If Qwest must use trunking within its network that is more than 50 miles, and that trunking is at capacity, it is *Qwest's* responsibility to perform the necessary upgrades in order to fulfill its obligations, not the CLEC's.[252] Indeed, by substantially raising the cost to the CLEC of choosing its own switch as the POI, Qwest has materially diminished the CLEC's ability to choose its own POI, and at the margin Qwest effectively forces the CLEC to build to a meet-point rather than incur the penalties associated with Qwest's 50-mile limitation. *See* 47 U.S.C. § 251(c)(2) (CLEC has the right to choose point of interconnection at any technically feasible point). Qwest's 50-mile limitation is blatantly discriminatory and anticompetitive, and violates Section 251(c)(2). *See* Wilson Dec. ¶¶ 33-36.

B. Qwest Denies CLECs Nondiscriminatory Access To Unbundled Network Elements.

Qwest discriminates against CLECs in the provisioning of unbundled network elements, in addition to OSS, in a number of ways that all violate its core checklist obligations. These include discrimination in (1) building new facilities to serve customers; (2) access to the network

[251] 47 U.S.C. § 251(c)(2)(A).

[252] Qwest's 50-mile limitation applies only to trunking *within* Qwest's network – *i.e.*, between Qwest switches – and *not* to trunking that connects a CLEC switch to the nearest Qwest switch (which Qwest calls an "entrance facility").

elements of Qwest's affiliates; (3) combining UNEs with telecommunications services; and (4) responding to mistakenly directed requests for maintenance and repair.

1. Qwest Discriminates Against CLECs That Place UNE Orders Requiring Construction of New Facilities.

Qwest has yet to fully implement its obligation to provide CLECs nondiscriminatory access to unbundled network elements in circumstances when a CLEC's UNE order requires construction of new facilities. It fails to meet its obligations in two respects.

First, in all states except Colorado, Qwest may refuse to build the new facilities necessary to provision a CLEC's UNE order in circumstances when Qwest would build such facilities to provision its own customer's order. As the Colorado Commission correctly held, that policy is flatly discriminatory. Second, in all five states, Qwest is allowed to cancel a CLEC's UNE order (either immediately or, in Colorado and Iowa, after 30 days) if Qwest concludes that capacity is not available, instead of holding the order indefinitely until capacity is available, as Qwest does for its own retail customers. This discriminatory policy allows a customer selecting Qwest for service that requires new capacity to keep its place in Qwest's "queue" for new facilities, while a customer who selects a CLEC finds its order cancelled and loses the priority it would otherwise have had for obtaining service had Qwest simply held the CLEC's order.

a. In Idaho, Iowa, Nebraska, and North Dakota, if a CLEC orders an unbundled loop and the facilities are not currently available, Qwest's SGATs provide that Qwest will build the loop only "if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic Local Exchange Service." SGAT § 9.1.2.1. As the SGAT states, "[i]n other situations, Qwest does not agree that it is obligated to build UNEs, but it will consider requests to build UNEs pursuant to Section

9.19 of this Agreement." *Id.* And under Section 9.19, Qwest applies the following standard: "Qwest will conduct an individual financial assessment of any request that requires construction of network capacity, facilities, or space for access to or use of UNEs." SGAT § 9.19.

As the Colorado Commission correctly recognized, these provisions are discriminatory. They permit Qwest to refuse to build a facility for a CLEC when Qwest would build that same facility for itself so that Qwest could provide the same service to the same retail customer that the CLEC intends to serve.[253]

For example, under the non-Colorado SGATs, Qwest is the only LEC that can effectively compete for customers needing new loops (because it can refuse to build loops for anyone but itself). When building new loops for CLECs, Qwest would rarely, if ever, be required physically to install new fiber in new conduit laid in newly acquired rights of way between an end office and the customer premises. Rather, Qwest would almost always be able to take advantage of its existing, ratepayer-financed infrastructure – *i.e.*, poles, conduits, rights of way, and copper or fiber conductors – that Qwest has already deployed and is using today, and could quickly and cheaply augment those facilities by, for example, adding newer electronics on optical fiber to increase capacity for additional loops and transport on existing fiber. A CLEC, by contrast, would virtually always incur the far greater, and usually prohibitive, costs of building a new loop from scratch, including obtaining rights of way, and installing conduit and new fiber.[254] Thus, by refusing to build facilities needed to fulfill a CLEC's UNE order, Qwest ensures that only Qwest is in a position economically to provide service for customers needing new facilities.

[253] Wilson Decl. ¶ 40.

[254] Wilson Decl. ¶ 41.

The Colorado Commission therefore correctly required Qwest to add language to its Colorado SGAT that requires it to build whenever it would build for itself.[255] Qwest's invocation of its POLR and ETC obligations is obviously inapposite, because those obligations are limited to DS0 loops. By providing Qwest standardless discretion to refuse to build for CLECs in circumstances when Qwest would build for itself, the four non-Colorado SGATs fail to meet the requirements of Section 251(c).

b. All five states permit Qwest to discriminate against CLEC UNE orders in one additional, important respect with respect to the building of new facilities. In Colorado and Iowa, the SGATs permit Qwest, when it does not have capacity to fill a UNE order, to hold a CLEC order for 30 days (to see whether facilities become available), and then, if capacity remains unavailable, to cancel the order.[256] At that point, the CLEC must "submit a request to build UNEs pursuant to Section 9.19 of this Agreement." In Idaho, Nebraska, and North Dakota, Qwest rejects the order immediately.[257]

Each of these SGATs is discriminatory, because none requires Qwest to treat the CLEC's order as Qwest would treat a comparable order from one of its own retail customers. Qwest holds its customers' orders indefinitely until Qwest has built the facilities to provision the requested service. That policy ensures that a Qwest customer's priority for receiving service contingent on new facilities is measured from the time of its original order for service; a CLEC customer, by contrast, loses its place in the "queue" when Qwest cancels the CLEC's order and requires submission of a new order.[258] The discrimination is compounded by the superior

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[255] *See* Colorado SGAT § 9.19 ("Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself"); Simpson/Stewart Access Dec. ¶¶ 23-24.

[256] SGAT §§ 9.1.2.1.3.2; 9.2.2.16.

[257] Wilson Decl. ¶ 42.

[258] Wilson Decl. ¶ 44.

knowledge and limited disclosure obligations that Qwest enjoys with respect to the constraints on existing capacity and the planning of new construction, which ensures that Qwest will always be better able than CLECs to alert prospective customers as to the implications of new-facilities construction for providing the service they request.[259] Qwest should therefore be required to treat CLEC UNE orders no differently than orders from Qwest retail customers when those orders will require construction of new facilities.

2. Qwest Denies CLECs Unbundled Access To The Network Elements Of Qwest Affiliates.

Qwest also fails to provide nondiscriminatory access to unbundled network elements in Idaho, Iowa, Nebraska, and North Dakota, because it does not permit CLECs to obtain nondiscriminatory unbundled access to the network elements – and, in particular, the local transport and dark fiber – of Qwest Corp.'s affiliates pursuant to sections 251 and 252 of the Act.[260] As Colorado has correctly recognized, those affiliates are subject to the Act's unbundling requirements. Qwest's refusal to give competitors access comparable to what Qwest enjoys is therefore discriminatory and unlawful.

Section 251(h) defines an incumbent LEC as a LEC that provided local exchange service in an area at the time of enactment of the 1996 Act and was deemed to be a member of NECA, or "a person or entity that, on or after such date of enactment, became a successor or assign" of such a LEC. Qwest Communications International ("QCI") is a holding company formed by the merger between Qwest and U S WEST, which has two relevant subsidiaries: Qwest Corporation ("QC"), the successor to the pre-merger U S WEST local exchange operations, and Qwest Communications Corporation ("QCC"), the successor to the pre-merger Qwest's operations. QC is indisputably an ILEC for purposes of Section 251(h). QCC, however, has deployed its own

[259] *Id.*

fiber transport facilities that can be used in the provision of local exchange service, and QC and QCC are now part of a merged firm that is integrating its operations. To the extent that QC is using or has access rights to QCC's transport facilities, QCC is a "successor or assign" of QC under Section 251(h) and thus would be subject to the Act's unbundling requirements as an ILEC.

This is clear from both the case law and the Commission's precedents. For example, when the Commission approved the Qwest/U S WEST merger, the Commission determined that the Qwest affiliates would be deemed "successors and assigns" under section 251(h) of the Act if Qwest attempted to transfer local exchange operations to the affiliate.[261] In that proceeding, McLeodUSA argued that the Commission should reject the merger application because, among other things, the merged entity "will have the ability to divert favored, high-volume customers to the affiliated [competitive] LEC, which can become the provider of new, innovative services, while the [incumbent] LEC's traditional local services are degraded and serve only residential users and other [competitive] LECs."[262] McLeod USA further argued that, after the merger, U S WEST will be able to use Qwest and its affiliates as competitive LECs "to attempt to avoid the [incumbent] LEC obligations under section 251(c)(4) of the Act to offer for resale, at wholesale rates, any services the [incumbent] LEC offers at retail." The Commission rejected McLeod's argument, and expressly stated that "[s]uch an affiliate of U S WEST would be considered a 'successor or assign' of U S WEST for the purposes of the obligations imposed by section

[260] *See* SGAT § 9.7.2.20.

[261] Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, CC Docket No. 99-272, 15 FCC Rcd. 5376, ¶ 45 (2000).

[262] *Id.* at n.131.

251(c)(4). Therefore, the competitive LEC hypothesized by McLeod would be treated as an incumbent LEC under section 251(c)(4)."[263]

Similarly, the D.C. Circuit held that SBC and Ameritech could not avoid their Section 251(c) obligations with respect to advanced services merely by shifting those operations to an affiliate.[264] In finding the affiliate to be a "successor or assign," the court specifically noted that the "affiliate markets the same category of services to the same body of potential customers as did the [ILEC]." Moreover, the court found that the fact that the ILEC had not transferred "its monopoly assets" to the affiliate was irrelevant. Given that the affiliate was providing certain local exchange services (*i.e.*, local advanced services), the court held that the Commission could not shield those operations from the requirement of Section 251(c) through "the technique of defining successor and assign to exclude the transfer" of those operations.[265] Indeed, the court held that allowing an ILEC to "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme."[266]

Qwest's attempts to shield the local facilities owned by its QCC affiliate from Section 251(c) are equally unlawful. As the Colorado Staff concluded, "[a]s it is occurring today, and as it continues into the future, the merged entities' facilities are becoming operationally integrated, and it is becoming virtually impossible to distinguish between fiber routes used exclusively for long distance or data services, and fiber routes that contain fibers used for transport of local

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[263] *Id.* at ¶ 45 (footnotes omitted).

[264] *See ASCENT* v. *FCC*, 235 F.3d 662 (D.C. Cir. 2001).

[265] *ASCENT*, 235 F.3d at 666-67.

[266] Indeed, the court dismissed such reasoning as improper "legal jujitsu." *Id.* at 667 ("[T]he Commission is using language designed by Congress as an added limitation on an ILEC's ability to offer telecommunications services as a statutory device to *ameliorate* § 251(c)'s restriction. We do not think that in the absence of the successor and assign limitation an ILEC would be permitted to circumvent § 251(c)'s obligations merely by setting up an affiliate

exchange services."[267] As a result, the staff recommended and the Hearing Officer agreed that Qwest should amend its SGAT in Colorado to offer unbundled access to any QCC dark fiber to which QC has access rights.[268] Qwest has yet to comply with the Act, however, in Idaho, Iowa, Nebraska, and North Dakota. For that reason as well, the Application should be denied.

3. Qwest's Refusal To Connect UNEs And Finished Services Is Discriminatory.

Qwest's Colorado SGAT is also blatantly discriminatory in that Qwest refuses to connect UNE combinations to certain "Finished Services," including "voice messaging, DSL, Access Services, Private Lines, resold services, and other services that this Commission or the FCC expressly prohibit to be connected to UNE combinations."[269] A CLEC can connect UNE combinations to such services only by making the connection itself in its collocation space. As at least one state commission has found, these provisions are discriminatory and deny CLECs the right to access UNEs at any technically feasible point.

The Commission permits an ILEC to refuse to connect UNE combinations and finished services in only one instance – an ILEC may refuse to connect "EELs" (enhanced extended links, or combinations of loop and transport) with special access services.[270] This is generally known as the ban on "commingling" – *i.e.*, a CLEC may not "commingle" EEL traffic and special access traffic on the same facilities. In that instance (and that instance alone), the ILEC can in effect force the CLEC to build two parallel networks in the same central office, one for UNE

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to offer telecommunications services. The Commission is thus using the successor and assign *limitation* as a form of legal jujitsu to justify its *relaxation* of § 251's restrictions").

[267] Colorado Staff Report on Emerging Services at 9 (Jan. 10, 2002).

[268] *See* SGAT § 9.7.2.20 ("Qwest shall allow CLEC access Dark Fiber owned directly by Qwest, or to which Qwest has a right of access resulting from agreement with a third party, whether or not affiliated with Qwest. CLEC shall have access to such fiber to the same extent that Qwest has access to such fiber").

[269] Colorado SGAT § 9.23.1.2.2.

[270] See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, ¶ 22 (rel. June 2, 2000) ("Supplemental Order Clarification").

traffic, and another for special access traffic. Such a arrangement would be so costly and inefficient that the ban on commingling effectively functions as a ban on the use of EELs altogether.

The Commission has never indicated, however, that ILECs could lawfully institute bans on other forms of "commingling" (*i.e.*, the connection of UNEs with other "finished" services). The ban on commingling that the Commission adopted in the *Supplemental Order Clarification* is a special, interim rule designed to address a unique situation (the possible migration of traffic from special access to UNEs). Qwest's newly minted bans on other forms of commingling would force CLECs to create the same sort of grossly inefficient network configuration – duplicative networks in the same central office for different services – that the Commission's debilitating ban on EEL/special access commingling requires. Such a policy would be blatantly discriminatory, because Qwest is not required to establish such duplicative and inefficient arrangements for the provision of the same services. An incumbent LEC is not permitted to impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.[271]

Moreover, section 251(c)(3) of the Act also allows access to UNEs at any technically feasible point,[272] using any technically feasible method.[273] The Commission has said that "the use of the term 'feasible' implies that interconnecting or providing access to an ILEC network element may be feasible at a particular point even if such interconnection or access requires a

[271] 47 C.F. R. § 51.309(a).
[272] *See also* 47 C.F.R. § 51.307(a).
[273] *Id.*, § 51.321(a).

novel use of, or some modification to, incumbent LEC equipment."[274] Qwest has never provided any evidence that accessing UNEs by connecting the UNE to a finished service is not technically feasible.[275] In fact, the SGATs implicitly concede that connecting finished services to UNEs is technically feasible by requiring such connection be done in a CLEC's collocation.[276] By restricting any combination of UNEs and tariffed services to combinations that a CLEC provisions itself in collocation space, Qwest is requiring CLECs to construct separate networks – one using private line/special access circuits and the other using UNEs – rather than permitting CLECs to use facilities from Qwest, or from multiple sources, to serve their customers most efficiently. Such a restriction not only is unnecessarily inefficient and expensive but it allows Qwest to control CLECs' market entry by delaying the provisioning of facilities or limiting the utility and availability of UNEs.

Other state commissions have rejected this restriction.[277] Qwest's SGATs in Idaho, Iowa, Nebraska, and North Dakota state that Qwest refuses to connect UNE combinations to "Finished Services" only where federal or state law specifically prohibits such connections.[278] In those states, therefore, there is some uncertainty whether the state will adopt Qwest's overbroad interpretation of the "commingling" exception. In Colorado, however, Qwest's SGAT, on its face, violates Qwest's obligation under section 271(c)(2)(B)(ii) to provide nondiscriminatory access to unbundled network elements.

[274] Local Competition Order, ¶ 202.

[275] The ILEC has the burden to prove that a method of accessing UNEs is not technically feasible. *See* 47 C.F.R. § 51.321(d).

[276] SGAT § 9.23.1.2.2; *see also id.*, § 9.6.2.1.

[277] *E.g., In re Investigation Into [Qwest's] Compliance With Section 271*, Washington Utils. & Transp. Comm'n Docket Nos. UT-003022 & UT-003040, Twenty-fourth Supp. Order at 10 (Dec. 20, 2001).

[278] *See* SGAT § 9.23.1.2.2 (ID, IA, NE, and ND) ("Where specifically prohibited by applicable federal or state requirements, UNE Combinations will not be directly connected to a Qwest Finished Service, whether found in a Tariff or otherwise, without going through a Collocation, unless otherwise agreed to by the Parties").

4. Qwest Provides Discriminatory Access To Unbundled Network Elements By Exploiting CLEC Customer Service Calls As Winback Opportunities.

Qwest denies CLECs nondiscriminatory access to network elements by converting its customer support for maintenance and repair into an engine for winning back CLEC customers. Specifically, in Colorado, Qwest's SGAT and ICA §§ 6.4.1 and 6.6.3[279] set forth Qwest's policies for dealing with CLEC customers that, in error, call Qwest with questions about service or maintenance and repair. Under the terms of its Colorado SGAT, Qwest is permitted to turn these misdirected calls into solicitation opportunities for itself. Those conditions are unreasonable because Qwest should not be permitted to abuse its unique position as the dominant local carrier by allowing it to capitalize upon misdirected calls from CLEC customers. These conditions are also discriminatory because, even though CLECs would theoretically be permitted to engage in the same conduct, real-world experience dictates that Qwest, as the dominant provider, will benefit almost exclusively from this winback practice.

In the proceedings below, AT&T proposed language that would prevent precisely that conduct by requiring carriers to direct such callers to the proper carrier, while nevertheless not prohibiting Qwest "from discussing its products and services with CLEC's or Qwest's end users who call the other Party seeking such information."[280] This proposal was a narrowly drawn restriction that safeguards the very important legislative goal of encouraging the growth of competition in the local telecommunications market. Indeed, Qwest admits that in the proceedings below, acting at the Multistate Facilitator's direction, it adopted the words "'seeking

[279] Depending of the version of the SGAT, § 12.3.8 as referenced in section § 6.6.3 may prove to create problems similar to those found in § 6.4.1.

[280] Wilson Decl. ¶ 77.

such information' at the end of [Section 6.4.1] . . . to the SGATs in Idaho, Iowa and Nebraska."[281]

Qwest, however, refused to adopt similar language in Colorado.[282] Qwest justified this unreasonable and discriminatory condition on providing resale products and services by arguing that the First Amendment guarantees Qwest the ability to turn misdirected incoming calls into marketing opportunities for its services.[283] As Qwest recognizes, its argument was rejected by the MultiState Facilitator, who concluded that "if a customer mistakenly calls Qwest or a CLEC, the end user customer should be instructed to contact the CLEC or Qwest, as appropriate, and Qwest's or the CLEC's representative should not be allowed to market their services to the end user unless the end user requests information about Qwest's or the CLEC's products and services."[284] However, a Colorado Hearing Commissioner agreed with Qwest, and ruled that the requested restriction would be an impermissible restriction on speech.[285]

That conclusion cannot be squared with a long line of decisions upholding similar reasonable limitations on BOC marketing efforts in the face of the same First Amendment challenges. The Supreme Court has repeatedly held that commercial speech, as here, enjoys only limited First Amendment protection. First, for commercial speech to be afforded any First Amendment protections, it must concern lawful activity and not be misleading.[286] And even if protected, commercial speech is properly subject to governmental regulation where, as here, the

[281] Declaration of Lori A. Simpson, at 12-13, ¶ 17.

[282] Simpson Decl. at 13, ¶ 18.

[283] Declaration of Lori A. Simpson, at 13, ¶ 18.

[284] *Id.* at 12, ¶ 17.

[285] *Investigation Into US WEST Communication's, Inc.'s Compliance With § 271(c) of the Telecommunications Act of 1996,* Colorado PUC Docket No. 97I-198T, Resolution of Volume II.A Impasse Issues, Decision No. RO1-848 (August 17, 2001).

[286] *Lorillard Tobacco Co.* v. *Reilly,* 121 S.Ct. 2404, 2421 (2001); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 563-64 (1980).

government has a substantial interest in support of its regulation and the restriction is narrowly tailored to materially advance that interest.[287]

As the Commission has previously found, "it cannot reasonably be denied that Congress's interest in managing an orderly transition to competition in the local telephone markets is an important one," and the goal of promoting competition in these markets is of substantial government interest.[288] Moreover, the modest limitation requested here – that Qwest not use mistaken inbound calls as an opportunity to market its services – is both narrow and tailored to further these substantial interests. The requested restriction has no impact whatsoever on any of the mass-marketing that Qwest routinely does and remains free to do; rather, it narrowly applies only those instances when Qwest's customer-service and operations-support personnel mistakenly receive an inbound call from a CLEC customer seeking only assistance with a problem related to CLEC service. Rather than soliciting those callers by telling them (or implying) that they would not have service problems if they switched their service back to Qwest, Qwest should simply refer those callers to the CLEC. The restriction also is tailored to reach the substantial federal interests, because it is focused on preventing Qwest from taking unfair advantage of its dominant position in the local exchange market by turning mistaken inbound calls into marketing opportunities for itself.

Indeed, the requested restriction is much more modest than the equal access requirements that BOCs have been operating under for years, and which were continued by Congress in

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[287] *See Lorillard,* 121 S.Ct. at 2421; *see also* CPNI Order, ¶ 43 ("Government restrictions on commercial speech will be upheld where, as here, the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn.").

[288] *In re AT&T Corp. v. Ameritech Corp.*, File No. E-98-41, Memorandum Opinion and Order (rel. Jun. 30, 1998); CPNI Order, ¶ 107.

section 251(g).[289] A core requirement of equal access is – and has long been – that when a BOC receives an incoming customer call for new service or a PIC change, the BOC representative must advise the customer of his or her options for long distance service in a neutral manner, and offer to read callers a random list of available interexchange carriers.[290] The goal of the equal access requirements, like the goal of the restriction requested here for mistaken inbound calls, is to limit a BOC's ability to take unfair advantage of its dominant market position, arising from its longstanding monopoly of local phone service. For competition to be fair, Qwest cannot be allowed to leverage its monopoly-based receipt of mistaken inbound calls to steer a competitor's customer back to Qwest. The First Amendment thus does not bar the requested limited and reasonable restriction on Qwest's marketing plans.

C. Qwest Fails To Comply With Its Obligation To Provide Unbundled Switching.

Section 271(c)(2)(B)(vi) of the competitive checklist requires a BOC to provide '[l]ocal switching unbundled from transport, local transmission, or other services."[291] Qwest fails in two ways to satisfy the requirement to provide unbundled local switching. First, Qwest refuses to provide switching or UNE-P when the end user has 3 or more lines in a wire center (instead of, as the Commission rules allow, three or more lines in a single *location*). Second, Qwest discriminates against CLECs by providing them with low quality packet switching.

[289] Similarly, the Commission has rejected First Amendment challenges to its restrictions on certain BOC marketing efforts using CPNI, *CPNI Order*, ¶¶ 43, 106, and has barred BOCs from using CPNI in marketing to retain "soon-to-be-former customers." *CPNI Reconsideration Order* ¶ 74. Notably, in restricting BOC use of CPNI in certain BOC marketing, the Commission recognized that "[c]arriers already in possession of CPNI could leverage their control of CPNI in one market to perpetuate their dominance as they enter other service markets. *CPNI Order* ¶ 37.

[290] *See, e.g., United States v. Western Electric Co., Inc.,* 578 F. Supp. 668, 677 (D.D.C. 1983); *BellSouth South Carolina Order* ¶ 239.

[291] 47 U.S.C. § 271(c)(2(B)(vi).

1. Qwest Improperly Exploits The Commission's Narrow Switching Carve Out Exception To Avoid Full Compliance With Its Obligation to Provide Switching As An Unbundled Network Element.

Qwest is obligated to make unbundled local switching available to competitive LECs. The Commission established a narrow "exception" to this obligation, such that ILECs who provide nondiscriminatory, cost-based access to enhanced extended links ("EEL") are not required to provide access to unbundled switching in the most dense urban zones in the top 50 metropolitan statistical areas ("MSAs") to a CLEC where the end user has four or more lines.[292]

Qwest's Colorado SGAT provides that "[t]his exclusion will be calculated using the number of DSO-equivalent access lines CLEC intends to serve an End User Customer within a Wire Center."[293] Under this provision, Qwest will count the total number of lines an individual customer has in a wire center to determine whether this exception applies.[294] This practice violates Qwest's obligation to provide unbundled switching, because counting lines on a "per-wire-center" basis rather than on a per-location basis unreasonably extends the Commission's narrow exception.

The Commission established the narrow exception after concluding that 3 lines or less "captures a significant portion of the mass market" of residential and small business customers. *UNE Remand Order* ¶ 293-94. Qwest's definition, however, excludes many small business locations CLECs can and should be able to serve via UNE-P. A business with two lines in two locations, or a husband and wife each with small businesses but using the same billing address for phone service, or a customer with three lines at a business location and another business line at home—each of these small business customers would fall within the Commission's definition

[292] *Id.* ¶¶ 253 & 278.

[293] SGAT §§ 9.11.2.5.2, *see also id.* § 9.11.2.5.1. In this five-state application, this issue is applicable only to Colorado, because Denver is the only MSA in these states in which the switching carve out exception applies.

[294] *See* Simpson/Stewart Switching Decl. ¶ 21.

of a mass market customer, but each might be excluded from receiving unbundled switching at UNE rates under Qwest's per-wire-center approach to counting lines.

Qwest's per-wire-center basis for counting lines was accepted by the state commissions based on a misreading of the Commission's *UNE Remand Order*. The Multistate Facilitator purported to resolve the issue by "giving meaning to the phrase chosen by the FCC," and then concluded that because "[t]he language says four lines in the relevant density zone[,] the rule should apply on a per-customer, not per-location basis." Multistate Facilitator's UNE Report (August 20, 2001), at 96, *citing UNE Remand Order* ¶ 253. The actual language of the *UNE Remand Order* does not support this reading.

In establishing the exception, the Commission said:

> We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs).

UNE Remand Order ¶ 253. The *UNE Remand Order* thus establishes an exception for end users with four or more lines, and that exception applies only within density zone 1 in the top 50 MSAs. Rather than read the reference to density zone 1 as identifying the geographic scope of the exception for unbundled local switching, however, Qwest's preferred reading treats the reference to density zone 1 as further restricting the class of end users – to those with four or more lines *within density zone 1* of a specified MSA. This "4 lines per density zone" reading is not really consistent with Qwest's per-wire-center approach—the two approaches would be consistent only if there were only one wire center for each density zone 1 in each of the 50 largest MSAs. In Denver there are five wire centers which constitute density zone 1, so if the Multistate Facilitator's conclusion that the exception applies to a customer with "four lines in the relevant density zone," were correct, the switching carve-out exception would apply to any customer with four or more lines in those five wire centers, not just within single wire center as the SGAT provision proposes.

The per-wire-center approach also is inconsistent with the Commission's rationale for making a distinction between smaller and larger business customers. A principal material difference the Commission identified as distinguishing small business customers from medium and large business customers is that the larger businesses "are often sophisticated users of telecommunications services that are able to order their operations in a manner that minimizes disruptions that may be caused by coordinated cutovers."[295] By contrast, any business location with one, two, or three lines that loses service on one or more of those lines during a coordinated cutover will be severely disadvantaged, and those consequences will be severe regardless of whether the end-user also does business at a different location somewhere within the same wire-center.

In addition, counting lines on a per-wire-center basis is unreasonable because a per-location basis is the only realistic way to implement the "3 lines or less exception" to an ILEC's obligation to provide unbundled local switching. While a CLEC may know how many lines a customer has at a single location, it may have no reason to know whether an end-user customer has multiple locations, and thus will not know how many lines a customer has within a wire center.[296] Indeed, the customer itself may not know how Qwest accounts for total lines within a wire center, and thus would be unable to tell the CLEC how many lines it has within the footprint of a given wire center.[297] The Commission should therefore hold that Qwest's "wire-

[295] *UNE Remand Order* ¶ 297.
[296] *See* Wilson Decl. ¶ 69.
[297] *Id.*

center" approach fails fully to implement Qwest's obligation to provide unbundled local switching.

2. Qwest Improperly Discriminates Against CLECs By Denying Them High-Quality Packet Switching Functionality.

Qwest also fails to satisfy section 271(c)(2)(B)(vi) by failing to provide unbundled packet switching[298] on a nondiscriminatory basis. The Commission has ruled that where the ILEC has deployed digital loop carrier ("DLC") systems[299] (and where spare copper facilities are not available or adequate) and the ILEC has located its DSLAM in a remote terminal but does not permit CLECs to collocate their DSLAMs in the ILEC's remote terminal on the same terms and conditions that apply to the ILEC DSLAM, the ILEC must provide CLECs with access to unbundled packet switching.[300] Qwest plans to remotely deploy DSLAMs on an increasingly broad scale,[301] and has acknowledged that this deployment will require it to provide CLECs access to unbundled packet switching.[302]

Although Qwest is obligated to provide unbundled packet switching on a non-discriminatory basis, it has flouted that obligation by offering CLECs only the lowest quality ATM connection from the DSLAM to the CLEC equipment.[303] Unspecified Bit Rate Service ("UBRS") is the poorest of five grades of service offered by Qwest to its retail customers,[304] but

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[298] Packet switching dividing messages between network users into units called "packets" (also known as "frames" or "cells") and then routing the packets between network users. *UNE Remand Order* ¶ 302. Critical to this process is the Digital Subscriber Line Access Multiplexer ("DSLAM"), which splits voice (low band) and data (high band) signals. *Id.*, ¶ 303. The low band, voice signal is transmitted toward a circuit switch, and the high band, data signal is combined with that of multiple lines in packet format and transmitted to a packet switch, typically ATM or IP. *Id.*

[299] In DLC, some portion of the end user's copper loop is replaced with a fiber segment (or shared copper) at a remote terminal between the end user's premises and the ILEC's switch. *UNE Remand Order* ¶ 313.

[300] *UNE Remand Order* ¶ 313.

[301] *See* Wilson Decl. ¶ 72.

[302] *See* Simpson/Stewart Switching Decl. ¶ 52.

[303] *See* Wilson Decl. ¶ 73.

[304] From best to poorest, the 5 grades of service are: CBR: Constant Bit Rate; VBRrt: Variable BitRate—real-time; VBRnrt: Variable Bit Rate—non real-time; ABR: Available Bit Rate;UBR: Unspecified Bit Rate. *See* Wilson Decl. ¶ 73.

it is the only grade of service Qwest makes available to CLECs and their retail customers. Qwest acknowledges that UBRS is suitable only for "non- real-time applications that are very tolerant to delay, delay variation and cell loss."[305] Thus, the connection that Qwest is providing is only suitable for email and downloading internet information, and not suitable for streaming audio, streaming video, VoIP or other internet-based services that define current high capacity service.[306]

Thus, while Qwest offers multiple grades of service from which its retail customers may select, CLECs and their customers are only offered the worst performing class of service. Such discriminatory treatment precludes a finding that Qwest fulfills is obligation to provide nondiscriminatory access to packet switching.

D. Qwest Denies CLECs Reasonable And Non-Discriminatory Access To Unbundled Local Transport.

Qwest's Idaho, Iowa, Nebraska, and North Dakota SGATs also do not provide CLECs just and reasonable access to unbundled dedicated local transport.[307] Qwest requires CLECs to purchase both Unbundled Dedicated Interoffice Transport ("UDIT") and "Extended Unbundled Dedicated Interoffice Transport" ("EUDIT"). The latter, however, is a flat-rated, non-distance-sensitive charge that serves only to raise the cost of purchasing transport. The improper and unnecessary EUDIT charge has been eliminated by at least two state commissions in the Qwest region, including by Colorado,[308] and the Commission should now confirm that its use in the other four states subject to this joint application violates the requirements of Checklist Item 5.

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[305] *Id., citing* Exhibit KLW-ES-6: Qwest Technical Publication 77408, Unbundled Packet Switching, Issue C, January 2002, Paragraph 2.2.2.

[306] *Id.*

[307] *See* SGAT § 9.6.1.1.

[308] *See In re Investigation Into [Qwest's] Compliance With Section 271*, Washington Utils. & Transp. Comm'n Docket Nos. UT-003022 & UT-003040, Twenty-Fourth Supp. Order at 11 (Dec. 20, 2001); Colorado SGAT § 9.6.1.1.

The Commission requires an ILEC to provide "unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers."[309] At a minimum, this requires ILECs to provide unbundled interoffice facilities between "end offices and serving wire centers ("SWCs"), SWCs and interexchange carrier ("IXC") points of presence ("POPs"), tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers."[310] "[A]n interoffice facility could be used by a competitor to connect to the incumbent LECs switch or to the competitor's collocated equipment."[311] Significantly, the Commission, requires dedicated transport to be recovered through a flat-rated charge,[312] reflecting the general rule that the costs for network elements "must recover costs in a manner that reflects the way they are incurred."[313]

Qwest's EUDIT rates structure violates these rules, because the rate for the EUDIT is non-distance sensitive. Qwest's UDIT charge applies to dedicated transport between Qwest's wire centers. Where, however, a CLEC wants dedicated transport from *its* wire center (or an IXC from its POP) to a Qwest wire center, the CLEC must order EUDIT.[314] Thus, the total price for dedicated transport from a CLEC wire center to a Qwest wire center is the sum of UDIT and EUDIT, rather than the price for the total facility distance based on UDIT alone. EUDIT is a flat-rated, non-distance sensitive charge. In practice, the EUDIT rate is usually identical to Qwest's loop rate, effectively treating the CLEC as if it were an end user instead of a local

[309] *UNE Remand Order* ¶ 323.
[310] *Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).
[311] *Local Competition Order* ¶ 440; 47 C.F.R. § 51.319(d)(2)(C).
[312] 47 C.F. R. §§ 51.507(a) and 51.509(c); *Local Competition Order*, ¶ 744.
[313] *Local Competition Order* ¶ 743.
[314] *See* Wilson Decl. ¶ 58.

exchange carrier. By imposing the EUDIT charge on competitors, Qwest greatly increases the total cost of obtaining unbundled transport.[315]

Qwest's EUDIT charge violates its checklist obligations because it fails to reflect the way costs are incurred. There is no basis in either economics or engineering for distinguishing between the transport between the CLEC's switch and the first Qwest wire center (called the "serving wire center" or SWC by Qwest) and the transport between Qwest's wire centers.[316] As such, there is no basis for creating separate UDIT and EUDIT charges.

Indeed, the EUDIT charge deters CLECs from building facilities to a meet point between a CLEC wire center and the Qwest SWC. Because the EUDIT is not distance-sensitive, a CLEC will have to pay the entire EUDIT charge even if it builds facilities out to some point closer to the Qwest SWC.[317] If the CLEC must pay the entire EUDIT rate, it has no incentive to build any of its own facilities between its wire center and Qwest's SWC. This alone demonstrates that the EUDIT is not cost-based, as required under § 252(d) of the Act.

Qwest's scheme is also discriminatory. Qwest permits CLECs to use UDIT to connect to another independent telecommunications carrier or local exchange carrier using a midspan meet arrangement, which is priced on a fixed and per mile basis.[318] Thus, if a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT.[319] If a CLEC wants dedicated transport to connect a Qwest wire center to the CLEC's own wire center, however, it must use a non-distance

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[315] *Id.*

[316] *See* Wilson Decl. ¶ 59.

[317] *See* Wilson Decl. ¶ 60.

[318] *See* Wilson Decl. ¶ 61.

[319] Qwest made this concession because that is how it has always treated neighboring independent LECs. *See* Wilson Decl. ¶ 61.

sensitive EUDIT.[320] For all these reasons, Qwest's imposition of EUDIT charges deny CLECs reasonable and nondiscriminatory access to unbundled local transport.

E. Qwest Denies CLECs Reasonable Access To Unbundled Dark Fiber By Impermissibly Applying The Commission's Test For Use Restrictions on EELs.

All five of Qwest's SGATs unlawfully restrict the use of dark fiber by applying the "use restrictions" test that the FCC adopted for Enhanced Extended Links ("EELs"), which are loop-transport combinations that are already combined in the ILECs' network.[321] The use restrictions have no possible application to dark fiber, because CLECs by definition always light (and generally combine) unbundled dark fiber themselves.

The Commission's use restrictions on EELs have only limited application. As the Commission noted in the *Supplemental Order Clarification* (¶ 2), "incumbent LECs routinely provide the functional equivalent of combinations of unbundled loops and transport network elements (also referred to as the enhanced extended link) through their special access offerings." As the Commission further explained, 47 C.F.R. § 51.315(b) "precludes the incumbent LECs from *separating* loop and transport elements that are *currently combined*," and therefore absent a special restriction "a requesting carrier could obtain these combinations at unbundled network element prices." *Id.* (emphasis added). Because the Commission had certain concerns about the ability of CLECs to convert existing loop-transport combinations to UNEs, the Commission adopted an interim rule that prohibits CLECs from converting such combinations to UNEs unless the CLEC is providing a "significant amount of local exchange service."[322] The use restrictions

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[320] *Id.*

[321] *See* SGAT § 9.7.2.9 ("CLEC shall not use UDF [unbundled dark fiber] that is part of a loop-transport combination, as a substitute for special or switched Access Services, except to the extent CLEC provides a 'significant amount of local exchange traffic' to its End Users over the UDF as set forth by the FCC").

[322] *See id.* ¶ 1.

do not apply, however, when the CLEC combines loop and transport itself in its own collocation, as Qwest itself has acknowledged.[323]

Accordingly, the Commission's use restrictions do not apply to dark fiber. By definition, CLECs light and usually combine dark fiber themselves in their own collocation cages. Therefore, Qwest's attempts to restrict the availability of unbundled dark fiber are patently unlawful.

F. Qwest Denies CLECs Nondiscriminatory Access To The NID.

Qwest's denial of reasonable, nondiscriminatory access to the network interface device (NID) is particularly anticompetitive. Although a CLEC may win a new customer and be anxious to establish facilities-based service for that customer, Qwest's policies can make it impossible for the CLEC to do so. That is because Qwest refuses to permit the removal of its unused loops from the protector side of the NID to make room for a CLEC that wins the customer to attach its loops.[324]

This issue arises principally in the context of AT&T's cable telephony offerings, where AT&T seeks to provide its own loops to multi-tenant dwellings. It is often the case that such buildings have covenants that prohibit competitors from installing an additional NID. In those instances, AT&T must have access to the protector side of the Qwest NID. Absent such access, AT&T cannot serve the customer.[325] Indeed, it is particularly costly and unreasonable for a CLEC to take its own loop facilities all the way to a customer's building only to find out that it can neither install a new NID nor use the protector side of the Qwest NID.

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[323] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Comments of Qwest at 6 (April 5, 2001) ("A competitive LEC can combine its UNE high-capacity loops with its UNE high-capacity transport at its collocation space to create a complete circuit to be used for exchange access purposes. This ability is not at issue in this proceeding").

[324] *See* SGAT § 9.5.2.1 and 9.5.2.5.

[325] Wilson Decl. ¶ 54.

Under Qwest's SGATs, however, a CLEC may use that NID only if space permits. Where, as is often the case, Qwest's unused loops remain attached to the only available terminals, Qwest refuses to remove, or let CLECs remove, those unused loops. Although Qwest purports to advance a "safety" rationale for this refusal, there is in reality no valid "safety" objection at all.[326] The Commission should therefore rule that, where CLECs can provide facilities-based service to a customer only through accessing a single, existing NID, an ILEC may not block such access by refusing to allow the removal of its unused loops.

G. Qwest Fails To Make DSL Available For Resale On Reasonable And Nondiscriminatory Terms And Conditions.

Checklist item 14 states that a BOC must make "telecommunications services . . . available for resale in accordance with the requirements of section 251(c)(4) and section 252(d)(3)." Section 251(c)(4) imposes on incumbent LECs the duty to "offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." The Commission has held that these requirements apply fully to the retail sale of digital subscriber line ("DSL") based telecommunications services.[327] Qwest has not satisfied its resale obligations because it has failed to offer for resale the DSL-based services that it provides to the Microsoft Network, L.L.C. ("MSN"), an Internet service provider ("ISP").

An investigation by the Minnesota Department of Commerce ("DOC") has revealed that Qwest has entered into an arrangement with MSN whereby Qwest is selling DSL transmission services to MSN pursuant to its publicly-filed tariff, but is also providing typical retailing

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[326] Wilson Decl. ¶ 55.

[327] *See* Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-330, CC Docket No. 98-147, ¶ 3 (1999) ("1999 Second Advanced Services R&O") ("we conclude that advanced services sold at retail by incumbent LECs to residential and business end-users are subject to the . . . discounted resale obligation"), *aff'd*, *ASCENT* v. *FCC*, 253 F.3d 29 (D.C. Cir. 2001).

functions, including marketing the service to end-users, billing end-users, and collecting payment from end-users, pursuant to off-tariff, non-public arrangements with MSN. The precise nature of these arrangements is not yet known because Qwest has not disclosed the actual contracts and has provided only the barest descriptions of what they contain. The information it has disclosed, however, confirms that Qwest is providing a service "at retail," and, therefore, that it is violating the Act's resale requirements because it is not making that service available to other telecommunications carriers at wholesale rates. Accordingly, on the current record, the Commission cannot make a reasoned finding that Qwest (which has the burden of proof) has demonstrated compliance with its resale obligations.

Rather than bring its agreements into the light of day, Qwest instead filed a Petition for Declaratory Ruling with the Commission, seeking a ruling that the Act's resale obligations do not apply "to an incumbent LEC that serves as a billing, collection, and marketing agent for an unaffiliated ISP."[328] Qwest's Petition makes two legal arguments in support of its attempt to escape statutory resale obligations, neither of which has merit. First, Qwest argues that its arrangement with MSN falls into a narrow exception to the general resale rules providing that DSL services "sold to [ISPs] as an input component to the [ISPs'] retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale."[329] Far from supporting Qwest's position, Rule 605(c) forecloses it. This rule permits ILECs to resell bulk DSL services to ISPs without also offering those services for resale, but that exception to the Act's resale requirement applies *only* where the particular service is one in which the ISP "that purchases a bulk DSL service must

[328] See Petition for Declaratory Ruling, Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides to MSN Are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act, WC Docket No. 02-77, at 14 (filed April 3, 2002) ("Petition").

[329] 47 C.F.R § 51.605(c). *See* Petition at 8-11.

itself, rather than the incumbent, provide . . . typical retail services to the ultimate consumer."[330] The "typical retail services" identified by the Commission included "sole responsibility for marketing, ordering, installation, maintenance, repair, billing, and collections vis-à-vis the end-user subscriber."[331] Because Qwest is providing these quintessential retail functions to end users, the DSL-based services that it is providing to MSN do not fall within the Rule 605(c) exception and therefore are subject to the Act's resale requirements.

Qwest alternatively claims that the Internet access service that customers purchase under Qwest's arrangement with MSN is a bundled information service (rather than a telecommunications service) and that Qwest has no resale obligation with respect to that service because § 251(c)(4) applies only to telecommunications services.[332] This claim ignores that the service at issue is not the Internet service that is provided to subscribers, but rather the DSL service Qwest provides to MSN. And that service plainly is a telecommunications service, as the Commission has already expressly and properly held.[333] Qwest therefore has an obligation to offer for resale at wholesale rates that DSL-based transport service, and its failure to do so precludes a finding of compliance with checklist item 14.

V. QWEST HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY.

"As a pre-condition to entry under section 271,"[334] Qwest and its section 272 affiliate must present evidence, not "paper promises," that establishes they will comply "with the

[330] 1999 Second Advanced Services R&O ¶ 15 (emphasis added).

[331] *Id.* (emphases added).

[332] Qwest PSC Petition at 12-14.

[333] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012, ¶¶ 11, 66-67 (1998); Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Rcd. 19237, ¶ 3 (1999); *ASCENT*, 235 F.3d at 668 ("Congress did not treat advanced services differently from other telecommunications services").

[334] *Non-Accounting Safeguards Third Order On Reconsideration* ¶ 2.

requirements of section 272."[335] As the Commission has frequently stressed, "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."[336]

Qwest and its section 272 affiliate, QCC, wholly fail to meet their burden. In fact, earlier this year an Administrative Law Judge for the Minnesota Commission ("Minnesota ALJ"), facing virtually the same Qwest declarations and supporting materials on section 272 compliance that are now before this Commission, found that Qwest had failed to meet its burden to establish *six* of the fundamental requirements imposed under section 272. Specifically, the ALJ ruled that Qwest failed to show that it and its section 272 affiliate operated independently, as required by § 272(b)(1), had separate officers and directors, as required by § 272(b)(3), had dealt with each other on an arms length basis, as required by § 272(b)(5), had adequately disclosed their transactions, as required by § 272(b)(5), had met the nondiscrimination obligations required by § 272(c), or had met the joint marketing requirements imposed by § 272(g).[337]

Qwest's application is silent on the violations identified by the Minnesota ALJ, and instead relies, fundamentally, on "paper promises" that it will comply with the requirements of § 272. Qwest thus cannot be found to have met its burden of establishing § 272 compliance, which provides an "independent ground[] for denying [this] application."[338]

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[335] § 271(d)(3)(B); *Michigan 271 Order* ¶ 55 (holding that "paper promises" cannot satisfy the BOC's burden under § 271).

[336] *Texas 271 Order* ¶ 395 (quoting Michigan 271 Order ¶ 346).

[337] *In the Matter of a Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272),* Minnesota Pub. Util. Comm., Findings of Fact and Conclusions of Law and Recommendations, PUC Doc. No. P-421/C1-01-1372 (Mar. 14, 2002) (hereinafter "Minnesota ALJ Findings") (Attachment 7, hereto). The Minnesota Commission has not yet rule upon the Minnesota ALJ's findings and recommendations. Although Qwest's current application does not include Minnesota, the issues raised in evaluating section 272 compliance are unaffected by state by state differences, as the Commission previously has recognized. *E.g. Verizon Pennsylvania Order,* ¶ 124 (finding section 272 compliance based on compliance established in Verizon earlier applications from different states).

[338] *New York 271 Order* ¶ 402. Qwest's reliance on reviews conducted by Arthur Andersen and KPMG to establish section 272 compliance is misplaced. *See, e.g.*, Schwartz Decl. ¶¶ 24-27. First, as Qwest acknowledges, the KPMG

A. Qwest And QCC Have Not Established That They "Operate Independently" As Required By Section 272(b)(1).

Section 272(b)(1) requires that a BOC and its long distance affiliate "operate independently," meaning, among other things, that the BOC and section 272 affiliate may not jointly own switching and transmission facilities or perform operation, installation, or maintenance ("OIM") services on each other's facilities.[339] The Minnesota ALJ held that Qwest and QCC had not established compliance with these requirements, and nothing new has been presented to this Commission to justify changing this conclusion.[340]

Like here, Qwest's affiants before the Minnesota ALJ promised that Qwest and QCC would not jointly own switching and transmission facilities.[341] The ALJ properly held that such bare promises did not meet Qwest's burden, noting that Qwest had "not presented documentary evidence that supports its assertion," and had not provided any "description of Qwest's asset deployment plan within its network strategy."[342] So too here, Qwest presents simple pledges to follow the law, without substantiating such claims with tangible evidence or a broader description of its network ownership plans.[343] Absent any further evidence or elaboration (whether, for example, Qwest and QCC intend to utilize any network facilities of Qwest

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review concerns only its alleged compliance with sections 272(b)(2), 272(b)(5), and 272(c)(2), and thus is irrelevant to the Minnesota ALJ's findings of noncompliance under sections 272(b)(1), 272(b)(3), 272(c)(1), and 272(g). *See* Schwartz Decl. ¶ 24. Moreover, KPMG's report (which concerned the period from April 1, 2001 to August 31, 2001) found that Qwest was *noncompliant* with sections 272(b)(2), 272(b)(5), and 272(c)(2), citing four instances when Qwest did not comply with the affiliate transaction pricing rules, and eight instances when the Company did not process accounting entries and affiliate billings and did not reduce to writing certain services provided between Qwest and the affiliate. *See* Schwartz Decl. ¶ 24 and Exh. MEH-272-3. Although Qwest characterizes these errors as minor and says they have been corrected, *see* Schwartz Decl. ¶¶ 25-27, such previous findings of noncompliance, coupled with the fact that no similar review was conducted by KPMG in advance of Qwest's current application, renders the old KPMG report of limited relevance to Qwest's claim of section 272 compliance.

[339] *See Non-Accounting Safeguards Order* ¶ 163; *Non-Accounting Safeguards Third Order on Reconsideration* ¶ 20.

[340] *See* Minnesota ALJ Findings ¶¶ 25-31; *see also* Selwyn Minnesota Aff. ¶¶ 27-30. L. Selwyn submitted an affidavit before the Minnesota ALJ on section 272 issues on behalf of the Minnesota Department of Commerce (hereinafter "Selwyn Minnesota Aff.") (Attachment 8, hereto).

[341] *See* Minnesota ALJ Findings ¶ 26.

[342] *Id.* ¶ 29.

[343] *See* Schwartz Decl. ¶¶ 39-42; Brunsting Decl. ¶¶ 27-28.

affiliates, and, if so, whether they agree that section 272(b)(1) bars their joint use of such facilities), Qwest cannot be said to have established compliance with section the "operate independently" requirement.

Similarly, Qwest and QCC promise, again without evidence or elaboration, that they will not provide OIM services for each other's facilities.[344] No detail is provided as to how such OIM services will in fact be provided in order to substantiate their claims. (Curiously, Qwest pointedly uses only the future tense when describing OIM services of QCC's facilities.[345] Like the Minnesota ALJ, the Commission should call on Qwest to present tangible evidence to establish compliance with section 272(b)(1), not just promises.

B. Qwest Has Not Established Compliance With The Separate-Employees Requirement Of Section 272(b)(3).

Under section 272(b)(3), a BOC and its section 272 affiliate must have "separate officers, directors, and employees." This requirement is intended to ensure, among other things, that the BOC and its section 272 affiliate are truly separate operating entities with "independent management and control of the two entities."[346]

Qwest cannot meet its burden under section 272(b)(3), as it asserts, simply by submitting lists of its current officers and directors and declaring that the payrolls for Qwest and QCC contain no overlapping names.[347] For example, a BOC-paid employee could not properly be deemed "separate" if he reports to a QCC supervisor and works day-to-day alongside QCC employees, and a section 272 affiliate's board cannot be deemed separate if it is comprised entirely (as here) of officers of the BOC parent.

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[344] Schwartz Decl. ¶ 42; Brunsting Decl. ¶ 27.

[345] *See* Brunsting Decl. ¶ 27(c) & (d)).

[346] *Michigan 271 Order* ¶ 360.

The Minnesota ALJ, after an exhaustive review of evidence before him,[348] concluded that Qwest had not established compliance with section 272(b)(3), finding:

> The arrangement of officers and directors created by Qwest goes beyond the common reporting of officers to a single superior outside of the particular corporate entity. The directors and officers of both the Qwest BOC and QCC are integrated within each company and the officers and directors of each company are integrated into the corporate structure of the common parent. Some of these same individuals have provided management between the Qwest BOC and its 272 Affiliate by contract. This structure defeats the purpose of the separate officers and directors requirement.

Minnesota ALJ Findings ¶ 60; *accord* Selwyn Minnesota Aff. ¶¶ 51-59.[349] Nothing in Qwest's submission here undermines this finding. Indeed, Qwest's submission raises still more questions that Qwest does not even attempt to answer. For example, Qwest acknowledges that employees of the BOC and section 272 affiliate maintain offices on the same floor of the same buildings, without attempting to show that this close physical proximity is reasonable and appropriate under section 272(b)(3).[350] Similarly, Qwest acknowledges that a large number of employees ("fewer than 200") were transferred between the BOC and section 272 affiliate "during the 272 transition period," without any further explanation as to who these employees are, what positions they held, or otherwise identifying any agreements between the BOC and affiliate concerning their transfer.[351] Much more needs to be known about such employee transfers before a finding of compliance with section 272(b)(3) can be made, because, as the Minnesota ALJ found, [t]here is

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[347] *See* Schwartz Decl. ¶ 53. Even on this narrow fact issue Qwest's application is deficient, as the information presented on employee payrolls for Qwest and QCC concerns a single review that was conducted over a year ago, in March 2001. *Id.* ¶ 53.

[348] *See* Minnesota ALJ Findings ¶¶ 39-61.

[349] *See also* Skluzak Minnesota Aff. ¶¶ 45-54 (attachment 9, hereto). The Minnesota ALJ's approach and findings are strongly supported by the review mandated by the Biennial Audit Procedures, which require an independent auditor to gather employee-specific information on each employee transferred between the BOC and section 272 affiliate, including their use and access to confidential information from their prior employer. *See* Skluzak Minnesota Aff. ¶ 47; Biennial Audit Procedures, Objective III, Procedure 5.

[350] *See* Schwartz Decl. ¶ 55(2).

[351] *See* Schwartz Decl. ¶ 56.

legitimate concern over employee transfers as a means of evading the separate employee requirement."[352] Finally, Qwest recites no policy and presents no evidence concerning the structure of employee reporting and supervision; Qwest cannot maintain an integrated workforce of BOC and section 272 affiliate employees, with Qwest employees reporting to BOC supervisors and BOC employees reporting to Qwest supervisors, and claim "separation" under section 272(b)(3) through the simple expedient of maintaining separate payrolls, publishing generic service-agreements, and using employer-identifying nametags. On this record, Qwest has not established compliance with section 272(b)(3).

C. Qwest Does Not Meet The 272(b)(5) Requirement That All Transactions With the Section 272 Affiliate Be At Arm's Length, Reduced To Writing, And Publicly Available.

Section 272(b)(5) requires that "all transactions" between Qwest and its section 272 affiliate be "on an arm's length basis with any such transactions reduced to writing and available for public inspection." Qwest is not currently in compliance with these requirements, and does not show that it will be in compliance if interLATA authority is granted.[353]

First, as the Minnesota ALJ found, the transactions between Qwest and QCC cannot be deemed at "arm's length" because both entities depend on their joint parent, QSC, to provide legal, public policy, and financial services for these transactions. Minnesota ALJ Findings, ¶¶ 78-80. As the ALJ reasoned: "Entities dealing with each other cannot depend upon the same source for legal services, public policy analysis, and financial consulting with respect to transactions occurring between the two entities and remain at "arm's length" in a transaction." *Id.* ¶ 79. Qwest presents no evidence in its application to dispute this finding, or to explain how

[352] *Minnesota ALJ Findings* ¶ 54.

[353] *See* Minnesota ALJ Findings ¶¶ 74-101; Selwyn Minnesota Aff. ¶¶ 38-50; Skluzak Minnesota Aff. ¶¶ 55-121.

this transaction structure can be deemed consistent with their arm's-length transactions obligations.[354]

Second, although acknowledging that a significant number of employees have been transferred between Qwest and QCC, *e.g.* Schwartz Decl. ¶ 56, no evidence appears in Qwest's application (or on its Internet site) to suggest that the agreements to transfer such employees ever were reduced to writing or that these employee transfers were conducted on an arm's length basis. Plainly, Qwest and QCC cannot engage in coordinated, planned employee transfers without meeting each of the section 272(b)(5) requirements. Such employee exchanges are of special concern because of the substantial "built-in" value offered by employees with substantial specialized training and confidential information.[355] Qwest has not established that it ever intends to comply with section 272(b)(5) concerning such employee transfers, let alone established that it is currently in compliance.

Finally, Qwest has on numerous past occasions failed properly to reduce covered transactions to writing and make them publicly available.[356] Qwest acknowledges many of these past errors, but promises that the circumstances that led to these problems have since been corrected.[357] Yet the Minnesota ALJ has cited numerous *current* instances where Qwest has failed to meet its reporting obligations under section 272(b)(5).[358] At the very least, given Qwest's admitted past noncompliance and the Minnesota ALJ's findings of current

[354] Moreover, as the Minnesota ALJ points out, the failure to engage in arm's-length transactions can seriously damage competition, because, for example, transaction pricing for a BOC and section 272 affiliate ultimately has a net zero effect on the financial returns to their joint owner, but has a serious impact on competing carriers because of the section 272(c) obligation to offer the same terms to competitors. *See* Minnesota ALJ Findings ¶¶ 83-84.

[355] In recognition of the value of such employee transfers, the "California PUC adopted a 25% 'employee transfer fee' to be applied against the annual salary of any Pacific Bell employee that is transferred to an affiliate." Selwyn Minnesota Aff. ¶ 51 (citing California Public Utilities Commission, D.87-12-067, 27 CPUC2d 1, 136).

[356] *See* Skluzak Minnesota Aff. ¶¶ 58-59, 97, 100.

[357] *See* Schwartz Decl. ¶¶ 19-20, 49.

[358] *See* Minnesota ALJ Findings ¶¶ 94-101.

noncompliance, Qwest must be compelled to submit substantial detailed evidence of its compliance with section 272(b)(5). Qwest has not come close to making such a showing in its current application, which devotes little time or effort to establishing section 272(b)(5) compliance and ignores the ALJ's findings.[359]

D. Qwest Has Not Demonstrated Compliance With Its Nondiscrimination Obligations Under Section 272(c).

Section 272(c)(1) "requires that a BOC in its dealings with its section 272 affiliate 'may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.'"[360] Qwest has not demonstrated compliance with this nondiscrimination requirement.

First, as the Minnesota ALJ found, Qwest has not established that the exchange of confidential information between Qwest and QCC complies with this nondiscrimination requirement.[361] Qwest claims that the use of confidential information by employees transferred between Qwest and QCC is prohibited, and suggests that access to such confidential information is just as restrictive for employees of Qwest or QCC as it is for employees of a competing carrier.[362] But Qwest ignores the fact that substantial confidential information is shared with, and inevitably used by, Qwest affiliates that provide substantial joint services for both Qwest and QCC. Qwest describes no restriction on the availability of such Qwest or QCC confidential information indirectly through affiliate personnel who provide services to both Qwest and

[359] *Cf. Second Louisiana 271 Order* ¶ 335 (BOC must "provide adequate assurances or demonstrate that it makes publicly available all transactions ... as required by section 272(b)(5) and the Commission's rules").

[360] *Second Louisiana 271 Order* ¶ 341 (quoting § 272(c)(1)).

[361] Minnesota ALJ Findings ¶¶ 105-06.

[362] *See* Schwartz Decl. ¶ 57; Brunsting Decl. ¶ 30(f).

QCC.[363] Indeed, Qwest does not even acknowledge a legal obligation to preclude such indirect use of confidential information. Qwest cannot meet its burden of proof regarding section 272(c) on this record.

Second, Qwest acknowledges that it provides a mechanism for its section 272 affiliate to request a new product, service, or information from Qwest, *see* Schwartz Decl. ¶ 79 & MES-272-13, but describes no similar mechanism being available to competing carriers. Thus, a procedure is in place for QCC to request new products and services, but other IXCs have no similar avenue for requesting new products or services, and instead must wait for Qwest to decide to provide a product or service to QCC before they also would be made available to AT&T. This procedure is discriminatory on its face, in violation of section 272(c).

Third, again as found by the Minnesota ALJ, the evidence presented in that proceeding showed that Qwest failed "to charge late payment fees to the 272 Affiliate in the same manner as late fees are charged to other IXCs," and thus constituted a violation of section 272(c)'s nondiscrimination requirements.[364] Qwest's application here does not respond to this issue. Instead, Qwest vaguely notes its right to charge QCC for late payments, and notes that "interest charges have been recorded," without submitting evidence that such late payments were collected (or, in the alternative, that late payments were similarly not collected from competing IXCs).[365]

Finally, because of the lack of information provided by Qwest concerning its joint marketing work on behalf QCC concerning "planning" services, no finding can be made that the joint marketing efforts (admittedly not made available to competing IXCs) are exempted from

[363] *See* Minnesota ALJ Findings ¶ 106.

[364] Minnesota ALJ Findings ¶¶ 72-73, 108.

[365] *See* Schwartz Decl. ¶ 19; Brunsting Decl. ¶ 41.

compliance with section 272(c).[366] Qwest thus has not established compliance with section 272(c).

E. Qwest Has Not Presented Any Evidence To Establish Compliance With The Joint Marketing Restrictions Of Section 272(g).

Qwest presents no evidence to establish compliance with its joint marketing obligations under section 272(g). Instead, Qwest simply parrots the requirements of the statute, and promises compliance. Such a total absence of evidence cannot meet Qwest's burden of proof, especially in light of the fact that the Minnesota ALJ specifically found Qwest had *not* established compliance with section 272(g).[367]

For example, section 272(g)(1) bars a section 272 affiliate from marketing or selling the BOC's telephone exchange services "unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services." As "proof" of compliance, Qwest simply states that "QCC will not" engage in such marketing or selling, Brunsting Decl. ¶ 49; *see* Schwartz Decl. ¶ 95, without either (i) affirmatively stating whether QCC currently does or does not sell and market Qwest's services, or (ii) if it does currently market such services, identifying the relevant applicable "arms length" agreements and showing that other outside companies have the same opportunities. Qwest makes no attempt to answer these questions, and thus cannot be found to satisfy section 272(g)(1).

Similarly, although Qwest makes clear its intention jointly to market QCC's services if its application is approved, *e.g.*, Schwartz Decl. ¶ 97, and the Minnesota ALJ noted that Qwest had then already billed QCC over $500,000 for joint-marketing "planning" services, *see* Minnesota ALJ Findings, ¶ 116, Qwest presents no evidence to show that the planned joint marketing will be conducted in compliance with section 272(g) and the *Non-Accounting Safeguards Order*.

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[366] *See* Minnesota ALJ Findings ¶¶ 108, 117.

[367] *See* Minnesota ALJ Findings ¶¶ 109-131; *see also* Skulzak Minnesota Aff. ¶¶ 150-159.

For example, Qwest does not even acknowledge, let alone promise compliance with, its obligation under section 251(g) to satisfy equal access requirements in any marketing efforts.[368] Although the Commission has found that a BOC need not submit proposed marketing scripts in order to show compliance with section 272(g), *South Carolina 271 Order* ¶ 236, it has never suggested that an applicant need present *no* evidence other than paper promises. Such evidence, if it exists, should be readily available to Qwest and not difficult to compile and present. For example, training materials concerning such joint marketing efforts could be submitted. If no written training materials are available, then Qwest could submit a description of what training was provided, to whom, and over what period of time.[369]

Finally, Qwest and QCC, although they appear already to have engaged in substantial planning and preparation for joint marketing of QCC's services, provide no evidence of what has been entailed in such work in order to show that it has been (and will be) consistent with the requirement that such "joint marketing" not include "BOC participation in the planning, design, and development of a section 272 affiliate's offerings."[370] Again, Qwest's simple pledge that it will not participate in such conduct is insufficient, especially in light of the broadly worded joint marketing agreement between it and QCC[371] and the fact that Qwest just last summer

[368] *See Non-Accounting Safeguards Order*, ¶ 292.

[369] AT&T describes such training materials and information as examples only, and does not intend to suggest that such materials could alone satisfy a BOC's burden in this area. Moreover, the minimal training materials that were submitted by Qwest are woefully inadequate to establish that Qwest will satisfy section 272(g). These materials include only a one-paragraph summary description of the joint marketing provisions, and do not even mention the equal access obligations. *See* Brunsting Decl. Exhibit JLB15 272

[370] *Non-Accounting Safeguards Order* ¶ 296.

[371] The Minnesota ALJ noted that, in the then-existing joint marketing agreement, Qwest committed to help with, among other things, "planning sales and promotion functions," but no Qwest witness was able to describe what was involved in the "planning functions." Minnesota ALJ Findings ¶¶ 113-115.

indisputably engaged in illegal marketing of QCC's services, only later to explain it "occurred under a mistaken interpretation of the application of the Act."[372]

On this record, no finding can be made that Qwest has and will meet the marketing requirements of section 272(g).

In sum, Qwest and its section 272 affiliate have not met their burden of showing that they will operate in accordance with section 272 if granted in-region interLATA authority. This application may be rejected on that basis alone.

VI. QWEST'S ENTRY INTO THE INTERLATA MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

Even if the Commission could find that Qwest had fully implemented its obligations under the competitive checklist, the record here precludes any finding that granting Qwest's application is consistent with the public interest. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully and irreversibly open to competition. Because the Commission cannot make this determination in Qwest's five states, a grant of section 271 authority is premature and wholly at odds with the fundamental premise of the Act.

A. InterLATA Authorization Is Not In The Public Interest Unless The BOC's Local Markets Are Irreversibly Open To Competition.

In Qwest's view, the Commission should virtually presume that the public interest will be served by granting Qwest's application, because (in Qwest's view) such approval will spur competitors to enter the local market. Any such presumption, however, would conflict directly

[372] Minnesota ALJ Findings ¶ 125. Specifically, in July 2001, Qwest ran advertisements in Minnesota newspapers promoting QCC's performance in a consumer satisfaction survey, and the Minnesota ALJ found that "the advertisements and scripts used by Qwest demonstrate that Qwest was engaged in joint marketing activity of the Qwest BOC and its 272 Affiliate prior to Qwest's entry into the interLATA market." Minnesota ALJ Findings ¶ 123; *see also* Skluzak Minnesota Aff. ¶ 156.

with the plain language of the statute, which puts the burden on the applicant to show that its entry would be "consistent with the public interest;" the Commission has flatly rejected the argument that the public interest test can be satisfied by simply presuming that the benefits of entry into long distance will outweigh competitive harms from premature authorization.[373]

In fact, the absence of any meaningful local competition is itself a compelling reason to reject an application as inconsistent with the public interest.[374] The lesson from experience in Texas is clear: allowing an incumbent LEC to provide interLATA services before local markets are open will not spur successful local competition.[375] If CLECs cannot profitably offer local residential service to customers, they cannot and will not effectively compete in local markets, regardless of whether the incumbent has obtained long-distance authorization.[376]

Accordingly, as the Commission has recognized, granting Qwest's request for long distance authority can serve the public interest only if the Commission finds that the BOC's

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[373] *See Michigan 271 Order* ¶ 43 ("Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied"); ¶ 388 ("As we have previously observed, 'the entry of the BOC interLATA affiliates into the provision of interLATA services has the potential to increase price competition and lead to innovative new services and marketing efficiencies.' Section 271, however, embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.")

[374] *See Sprint* v. *FCC*, 274 F.3d 549 (D.C. Cir. 2001).

[375] Although Qwest boasts (Br. at 179-80) of competition currently being provided by Texas CLECs, the January 2001 *TPUC Report* on the "Scope of Competition in Telecommunications Markets of Texas" reveals that "monopoly power exists . . . in residential and rural markets in Texas" (*id.* at 83; *see* xiii) and severe financial problems have caused both large and small CLECs to reduce or eliminate their residential service in Texas (*id.* at 55-58, 80-81). The Report also reveals that the lack of competition has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and to *raise* its prices for local services to both residential and business customers. *Id.* at x, 62-64, 79, 81). In sum, the TPUC concludes: "By the end of 2000, SWBT's financial position had strengthened relative to the CLECs. *SWBT's entry into the long distance market has weakened the ability of CLECs to challenge SWBT in local voice service. Id.* at 81 (emphasis added).

[376] Emboldened by its ability to market bundles of local and long distance services without any competition, in February, 2001, SWBT *raised* its residential long distance rates in Texas by 10 to 33 percent, *increased* its basic rates for long-distance service by more than 10 percent, and *also increased* the "discounted rate" for customers who buy other services from SWBT by 33 percent. "SWBT Raises Nonlocal Call Rates: Company Says Prices Better Reflect Costs," *The Dallas Morning News*, February 2, 2001.

"local market is open and will remain so."[377] As the Commission has likewise recognized, no such finding is possible if the "BOC has engaged in discriminatory or other anticompetitive conduct, or failed to comply with State and federal telecommunications regulations," because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations."[378] While the Commission has stated that it "will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it has indicated that it will take such action where, as here, "a pattern of discriminatory conduct" exists that undermines its confidence that the relevant "local market is open and will remain so" after the grant of Section 271 authority.[379]

B. Qwest Has Engaged In A Pattern Of Anticompetitive Acts And Violations Of Sections 251, 252 and 271 Of The Act To Maintain And Expand Its Market Power Over Local Service.

Qwest has failed "to cooperate in opening its network to competitors" and instead has engaged in a pattern of "discriminatory and other anticompetitive conduct" that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Over the past five years, Qwest (and its predecessor US WEST) have undertaken a pervasive effort to forestall competition in its local exchange markets at the same time that it launched its efforts to provide service across LATA boundaries. These ongoing anticompetitive and unlawful actions conclusively refute Qwest's claim that it is, and will remain, committed to "accelerat[ing] and complet[ing] the process of opening its local markets to competition."[380]

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[377] *See SBC Texas 271 Order* ¶ 431.

[378] *Michigan 271 Order* ¶ 397.

[379] *See Michigan 271 Order* ¶¶ 391, 397; *SBC Texas 271 Order* ¶ 431; York 271 Order ¶ 431, 444.

[380] Application at 2.

1. Qwest's Violations of Section 252 (Secret Interconnection Deals).

As demonstrated above, Qwest has undertaken a deliberate, region-wide scheme to violate its nondiscrimination obligations under the Act by violating Section 252 and conspiring to confer secret, favorable interconnection "deals" on selected CLECs. In some of these secret interconnection arrangements, Qwest has silenced its CLEC competitors, securing their acquiescence to a prohibition on their participation in the proceedings evaluating Qwest's compliance with its requirements under Section 271. Qwest concealed these interconnection agreements from the state commissions, rather than file them as the Act requires, to prevent other CLECs (and the state commissions) from becoming aware of the favorable interconnection terms and conditions that were not being made available to other CLECs.

This pervasive anticompetitive practice has now been the subject of actions by several independent state authorities, including Iowa, Arizona and Minnesota. The Iowa Utilities Board found that Qwest had violated section 252 of the Act and section 38.7(4) of the Iowa Code by failing to file three interconnection agreements in a timely manner.[381] The Board ordered Qwest to identify and file any other interconnection agreements that are effective within Iowa, providing sixty days for compliance with this mandate.[382] The staff of the Arizona Corporation Commission ("ACC") confirmed the obviousness and seriousness of Qwest's section 252 violations and anticompetitive conduct in a report released on June 7, 2002, which recommended that Qwest be required to file 25 secret agreements.[383] The staff has also recommended a significant assessment of fines for the failure to file these agreements, and explicitly

[381] *AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2, May 29, 2002, at 16 (Attachment 8 hereto).

[382] *Id.* at 17; *see supra* at 21-23 (discussing Iowa findings of Section 252 violation and discrimination).

[383] *Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 17-18 (Attachment 4 hereto).

recommended a higher forfeiture for seven agreements that "contained clauses *prohibiting* the carrier or CLEC from participating in a state regulatory proceeding" because of "the more egregious nature of the infraction."[384] Qwest's unlawful conduct also is under investigation in other states, including New Mexico, Washington, and Minnesota, where the Minnesota Department of Commerce is seeking to have millions of dollars of sanctions imposed against Qwest.[385]

AT&T demonstrated above that Qwest's secret, discriminatory agreements preclude any reasoned finding that Qwest satisfies the competitive checklist. These agreements also preclude a finding that Qwest's application is in the public interest for two independent reasons. First, Qwest's practice of entering into and concealing these interconnection arrangements violates section 252 of the Act, and directly impairs the development of a competitive local exchange market. Qwest's discriminatory provision of interconnection and network elements on preferential terms to some CLECs but not others has a direct and obvious inhibiting impact on the development of a competitive local exchange market. Qwest's deliberate concealment of these agreements from state regulators and CLECs then exacerbated this problem because regulators could not take action against these discriminatory agreements and potential entrants were unaware of the availability of terms and conditions offered to their competitors.

Second, provisions in several of these secret agreements prohibit the participation of necessary parties in the proceedings concerning Qwest's application for section 271 authority and therefore raise serious public interest concerns. As the ACC staff concluded, "agreements which attempt to suppress participation by all parties for full development of the record in

[384] *Id.* at 18-19 (emphasis in original); *see supra* at 24-25 (discussing findings in Arizona).

[385] *See supra* at 19-20 (discussing Minnesota proceeding, discriminatory concealment of preferential treatment on rights of way and other terms).

regulatory proceedings before the Commission are not in the public interest."[386] As the ACC Staff correctly recognized, the critical role of state commission section 271 proceedings is wholly undermined if the efficacy of these proceedings is cast into doubt. Similarly, the Commission's section 271 approval process is a meaningless exercise if parties with relevant information are silenced or excluded. Granting Qwest's application in the face of these grave concerns about the fundamental integrity of the approval process cannot be in the public interest.

2. Qwest's Violation of Section 251 (Refusal To Test UNE-P Services).

At the same time that Qwest has concealed discriminatory interconnection arrangements and purchased CLEC silence in state section 271 proceedings, it has engaged in unlawful efforts to avoid its interconnection obligations, with at least one of these derelictions resulting in an adverse finding by a state commission. On April 9, 2002, the full Commission of the Minnesota PUC concurred with the findings of an Administrative Law Judge ("ALJ") that Qwest had engaged in anti-competitive behavior, violating its interconnection agreement with AT&T and violating state and federal law. Qwest's actions demonstrate that it has no intention to cooperate with CLECs in testing and implementing competitive service offerings.

The facts of the adjudicated refusal of Qwest to provide required services are simple and quite telling.[387] AT&T informed Qwest that it intended to test UNE-P ordering and provisioning in Minneapolis ("Test Trial"). Despite months of meetings between the parties, Qwest at the eleventh hour flatly refused to conduct the Test Trial. Consequently, AT&T filed a complaint

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[386] Arizona Report at 1; see also id. at 16 ("[P]rovisions in agreements which gave favored treatment in exchange for a party's agreement not to participate in proceedings before this Commission . . . are of extreme concern to the Commission and detrimental to the public interest").

[387] The recommended decision of Administrative Law Judge Mihalchick, for the Minnesota Public Utilities Commission, February 22, 2002, is Attachment 10 hereto. The recommended decision contains a detailed discussion of the facts of the case.

with the MPUC.[388] In addressing the AT&T's complaint on its merits, the ALJ concluded that Qwest committed a knowing, intentional, and material violation of its obligation to engage in cooperative testing under the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000, to May 11, 2001. In his decision, the ALJ emphasized that Qwest's violations were knowing and intentional and constituted "a continuing pattern of conduct."[389] The ALJ also found that Qwest deliberately fabricated evidence in an attempt to assert that AT&T did not intend to enter the local exchange market in Minnesota.[390] These findings of the ALJ, left undisturbed by the full Commission, not only demonstrate an on-going pattern of anticompetitive behavior on the part of Qwest, but also show a willingness and ability on Qwest's part to violate Section 251, to prevaricate and to subvert the ability of a regulatory body to ensure that it will live up to its obligations in a competitive environment.

3. Qwest's Pervasive Violations of Section 271.

Qwest also clearly has engaged in a deliberate pattern and campaign of evading section 271, both before and after conditions were imposed on Qwest as part of its merger with U S WEST. The Commission has on three occasions adjudicated Qwest, and U S WEST before it, responsible for violating section 271. Qwest's penchant for prematurely entering the market for the provision of InterLATA services has not abated, because violations continue to this day.

Three FCC Adjudicated Violations. In at least three instances, Qwest and its predecessor U S WEST entered the interLATA long distance market in violation of section 271. First, the Commission addressed U S WEST's "teaming" arrangement with pre-merger Qwest and held

[388] On April 30, 2001, the Minnesota PUC issued an Order granting AT&T temporary relief requiring Qwest to complete certification and bill-conductivity testing. *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against Qwest Corporation*, Docket No. P-421/C-01-391, Order Granting Temporary Relief and Notice and Order for Hearing, issued April 30, 2001 (Attachment 11 hereto).

[389] *See id.* at 34.

[390] *See id.* at 30-33; Minn. Stat. §237.121(a)(1).

that it violated section 271.[391] Under the "teaming" arrangement, U S WEST (and Ameritech) provided their local customers with a one-stop shopping opportunity that included interLATA services in violation of section 271.[392] Specifically, under the arrangement between U S WEST and Qwest, the incumbent local exchange carrier, among other things, (1) designed and developed a package of services that included long distance service, (2) selected and recommended Qwest as the long distance provider for the offering, (3) established and prospectively controlled the price, terms and conditions of the long distance offering, (4) served as the customer point of contact for the offering, and (5) marketed the offering under their brand.[393] In the face of these facts, the Commission concluded that:

> the business arrangements with Qwest permit Ameritech and U S WEST to provide in-region, interLATA services, prior to section 271 authorization. It is clear on this record that Ameritech's and U S WEST's business arrangements with Qwest pose the competitive concerns that section 271 seeks to address, and we accordingly find them unlawful under the Act.[394]

In the second proceeding, the Commission held that U S WEST's "provision of nonlocal directory assistance service to its in-region subscribers" constituted "the provision of in-region, interLATA service as defined in section 271(a) of the Act."[395] As the Commission recognized, the "nationwide component of U S WEST's nonlocal directory assistance service" was "unlawful" as it had been configured.[396] Once again, Qwest provided in-region, interLATA

[391] AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation, Memorandum Opinion And Order, 13 FCC Rcd 21438 (1998) ("Qwest Teaming Order") ¶ 52.

[392] *Id.* ¶¶ 1, 52.

[393] *Id.* ¶ 1.

[394] *Id.* ¶¶ 44, 52. The Commission noted that with the local market not yet open to competition, the results of offering local customers one-stop shopping were astoundingly anticompetitive. By leveraging its dominance in the local market to gain long distance customers, U S WEST persuaded *130,000* of its local customers to purchase Qwest's long distance service in just four weeks of marketing the unlawful one-stop shopping program.

[395] See Petitions of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; U S WEST Communications, Inc. for Forbearance, Memorandum Opinion and Order, 14 FCC Rcd 16252 (1999) ("NDA Order") ¶¶ 2, 63.

[396] *Id.* ¶ 63.

service without first demonstrating that its local markets were open to competition, without Commission approval, and in violation of Section 271.

Third, in February 2001, the Commission held that U S WEST's provision of a calling card platform that permitted its local subscribers to place long distance calls originating inside or outside of its local service area violated Section 271.[397] In finding that U S WEST intended to provide in-region, interLATA service, the Commission found that:

> U S WEST's participation in the long distance market through its 1-800-4USWEST Service enables it to obtain significant competitive advantages that are similar to what the *Qwest Teaming Order* found to be objectionable and almost identical to what the *1-800-AMERITECH Order* found to be objectionable. The Service allows U S West to build goodwill with its local-service customers, depicting itself as a full-service provider prior to receiving section 271 approval. Indeed, the full-service, or one-stop shopping, advantages provided by the Service appear to have been U S WEST's primary objective in implementing the Service in the first place. As the Commission held in the *1-800-AMERITECH Order,* these competitive advantages could reduce U S WEST's incentive to open its local market to competition and, thus, run counter to Congress's intent in enacting section 271.[398]

For the third time, the Commission found that Qwest had undertaken to provide interLATA services with the specific intent of undercutting the foundation of section 271.

Current Violation Of Section 271. While this pattern of past adjudicated violations of section 271 should cause ample Commission concern, Qwest's continuing violations of section 271 are even more troubling. Specifically, in violation of section 271 and the merger conditions that were imposed on Qwest's merger with US WEST (the "Merger"), Qwest continues to provide prohibited interLATA services. These violations are documented in proceedings that

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[397] *AT&T Corporation v. U S WEST Communications, Inc.; MCI Telecommunications Corporation, Inc. v. U S WEST Communications, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 3574 (2001) ¶ 30.
[398] *Id.* ¶ 19.

surround audit reports filed by Qwest required by conditions on the Merger.[399] Qwest has employed three separate schemes, each of which is patently unlawful: it has used lit fiber capacity IRUs,[400] it has provided interLATA services to customers under the guise of "corporate communications,"[401] and, most brazenly, it has directly provided interLATA services "billed and *branded* as Qwest services."[402] As AT&T demonstrated in the audit proceedings following the Merger, the post-merger lit fiber capacity IRU arrangements neither were, nor could have been, approved in the *Qwest Merger Orders* and flatly violate section 271.[403]

In order to bring the Qwest-US WEST merger into compliance with Section 271, Qwest committed to divesting its interLATA operations in the US WEST region to an "independent" competitor, Touch America. The Commission accepted Qwest's and US WEST's representations that Touch America would not be dependent upon or controlled by Qwest and, therefore, that Qwest post-merger would not be "providing" interLATA services in violation of section 271. There is now substantial evidence that Qwest concealed a number of steps that it took to ensure that Touch America would remain dependent on Qwest in providing services to

[399] Two complaints also have been filed by Touch America, Inc. ("Touch America") against Qwest that relate to the violations documented in the audits filed pursuant to the Merger conditions. *See* Complaint, *Touch America, Inc. v. Qwest, Communications International, Inc.*, File No. EB-02-MD-003 (Feb. 2002) ("*IRU formal complaint*") and Complaint, *Touch America, Inc. v. Qwest, Communications International, Inc.*, File No. EB-02-MD-004 (Feb. 11, 2002) (revised and refiled March 1, 2002) ("*Divestiture formal complaint*").

[400] Letter from Arthur Anderson LLP to Dorothy Attwood (June 6, 2001), Finding 7 ("June 6, 2001 Supplemental Letter") (found with respect to 14 of 92 in-region service component codes sampled).

[401] *Id.*, Finding 2 (11 of the 458 account records were identified as providing prohibited in-region service in this manner).

[402] Report of Independent Accountants, Att. 1 at 1 (April 16, 2001) ("Initial Auditor's Report") (emphasis added); *see also id.* (for 266 customers with associated revenues from July 2000 through March 2001 in excess of $2.2 million); June 6, 2001 Supplemental Letter, Finding 9 (Qwest paid touch America only $856,863 out of $2,212,730 billed under for in-region interLATA services sold under Qwest's brand).

[403] Memorandum Opinion and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* 15 FCC Rcd. 5376 (2000) ("March 10 Merger Order"); Memorandum Opinion and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 11909 (2000) ("June 26 Merger Order") (collectively the "Qwest Merger Orders").

divested customers. Apparently, immediately after the "divestiture," Qwest undertook a concerted campaign to reacquire the most valued divested customers and to provide them (and others) with prohibited in-region interLATA services.

Specifically, although Qwest assured the Commission during the Merger proceedings that Touch America would be independent of Qwest when providing in-region interLATA service,[404] it plainly was not. Qwest, for example, assured the Commission that it would provide Touch America with sufficient access to Qwest databases so that it could support the in-region service customers being divested to it,[405] but as explained by Touch America, "Qwest has exercised such control over the data systems and software as to prevent Touch America from independently operating or servicing Transferred Customers."[406] Qwest similarly assured the Commission that under the Bilateral Wholesale Agreement, Touch America was not required to purchase out-of-region capacity on a wholesale basis from Qwest;[407] Touch America now says that Qwest's undisclosed billing system structure precluded Touch America from billing the transferred customers if it used a third party off-net provider for out-of-region capacity.[408] Qwest also represented to the Commission that it would lease to Touch America four circuit switches,[409] but Touch America has now disclosed that this did not occur and that Touch America was granted only limited functionality that did not provide it "with the kind of operational control over the

[404] *See, e.g.*, Qwest's Divestiture Compliance Report, at 18 (April 14, 2000) ("*April 14, 2000 Divestiture Plan*") (that under the Divestiture Plan "Qwest has further protected Touch America's ability to maintain a viable independent business within the region without restricting Touch America's ability to grow its business for national accounts"); *see also id.* at 12 ("Touch America is a strong and independent carrier that has the financial capacity and operational experience to provide excellent service to the customer base that Qwest will be divesting").

[405] *Id.* at 40-41.

[406] Divestiture formal complaint ¶ 193.

[407] "Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report," Attachment A to Qwest's Reply Comments, at 20-21 (May 12, 2000) ("*Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report*").

[408] Divestiture formal complaint ¶¶ 306-307.

[409] April 14, 2000 Divestiture Plan at 4, 19-20, 42.

switches that would allow Touch America to perform the 'core functions' associated with the operational management of a switch."[410] Just as significantly, Qwest did not disclose to the Commission its "lit fiber" "Indefeasible Rights of Use" ("IRUs") agreement with Touch America, although it contemplated the need for such an agreement even before it submitted its Divestiture Plan and began "negotiations" with Touch America weeks before the Commission issued its *Order* approving the Merger. Under this agreement, Touch America was required to pay Qwest for leasing interLATA network facilities *owned and operated by Qwest* in order to provide retail services to Touch America's "customers."

Qwest used these schemes as part of a winback strategy for large customers to replace private line services provided by Touch America. Thus, as set forth in Touch America's complaints, Qwest was able to reacquire Teleglobe, which was receiving leased line private line service from Touch America, by offering it lit fiber capacity IRUs.[411] Similarly, in March 1998 Qwest announced a 15-year pre-paid private line service arrangement with Verio.[412] Verio was then divested to Touch America and reacquired by Qwest with lit fiber capacity IRUs.[413] Touch America identified four other private line customers reacquired by Qwest using lit fiber capacity and alleges that a number of government accounts were also affected.[414]

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410 Divestiture formal complaint ¶ 282; see generally id. ¶¶ 272-292.

411 IRU formal complaint ¶¶ 75, 78.

412 *See* Verio Form S-1/A filed on May 8, 1998, Exhibit 10.25, http://www.sec.gov/Archives/edgar/data/1040956/0000950134-98-003922.txt ("*Verio/Qwest Capacity Service Agreement*")

413 IRU formal complaint ¶¶ 53-54.

414 *Id.* ¶¶ 26-80. There is likewise considerable evidence that Qwest has been using in-region interLATA "corporate communications" in violation of Section 271. *Divestiture formal complaint* ¶¶ 338-40, 350-54, 431-46, 506. Touch America's complaints allege that Qwest has in fact been using its "corporate communications" to provide ordinary telecommunications services to unaffiliated third parties and that these services are not permissible Official Services or incidental interLATA services. All three audit reports filed by Qwest reveal that it has, in addition to these "stealth" in-region InterLATA services, also directly provided millions of dollars of *Qwest branded* in-region interLATA services and retained a substantial portion of the revenues from such services.

The Arizona InterLATA Gambit. As a final note on its anti-section 271 efforts, it must be recognized that Qwest's efforts began in Arizona, where US WEST attempted to make an "end-run" around the interLATA restrictions and provide long distance service there without opening its local market to competition. Specifically, Qwest sought to remove the LATA boundary within Arizona by asking that the ACC abolish the boundary. Once the LATA boundary was gone, Qwest believed it could provide telephone service throughout the state because such service would not be "interLATA service" within the prohibitions of Section 271.

The Commission was understandably quite concerned with these efforts to commit a "willful and knowing violation of the Act and the Commission's rules."[415] The Chief of the Commission's Common Carrier Bureau took the unusual course of writing to US WEST, stating the Commission's particular concern with expressions by US WEST representatives that the Commission lacked authority over in-state LATA boundaries and that US WEST could "provide telecommunications services across current LATA boundaries in Arizona without first applying to, and receiving approval from," the Commission for LATA boundary modifications. The Commission's concern rose to such a level that it required US WEST to provide a "written commitment" that it would not "begin to offer any telecommunications services across current LATA boundaries prior to receiving authority to do so from the FCC." In taking such an unusual step, the Commission appears to have been prescient with respect to Qwest/US WEST's propensity to compete in the provision of interLATA services without first opening its local exchange markets.

[415] Letter, June 1, 1999, from Lawrence E. Strickling, Chief, Common Carrier Bureau, to Mr. Bruce K Posey (Attachment 12 hereto).

4. Qwest's Other Anticompetitive Conduct

Freezing Service. Qwest has been ordered by the Iowa Board to cease its practice of freezing local service changes.[416] In response to a formal complaint filed by Cox Iowa Telecom, LLC ("Cox Iowa"), the Iowa Board investigated the need for Qwest's newly adopted policy freezing the switching of local service. The Board found only 14 confirmed cases of local slamming in Iowa in the one-year period that preceded Qwest's action, and concluded that given "the negligible state of local competition in Iowa and the few instances of local service slamming," the "local service freeze implemented by Qwest" at that time was "unnecessary to protect consumers" and would "have a detrimental effect on local competition."[417] Despite the action in Iowa, Qwest has maintained the policy of attempting to institute local service freezes in other states, and on March 29, 2002, AT&T was required to file a complaint with the Washington Utilities And Transportation Commission about Qwest's practice of adding local freezes to Qwest local service accounts.[418] As a result of Qwest's unilateral actions, customers were unable to switch to AT&T Broadband local service due to freezes on their accounts, even though the majority of customers asserted that they never authorized the freeze.

In fact, Qwest has a history of adopting anticompetitive freezes. In Colorado in February 1999, Qwest unilaterally extended PIC freezes (known as "jamming"). Qwest implemented this "PIC freeze extension" the day that intraLATA presubscription was implemented in Colorado – the first time that customers were able to choose their intraLATA carrier. Prior to intraLATA presubscription, and at the time that Qwest extended the preferred carrier freeze, customers in Qwest's service territory had no choice regarding the carrier that carried their intraLATA toll

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[416] *Cox Iowa Telecom, LLC* v. *Qwest Corporation*, Docket No FCU-02-1, released April 3, 2002 (Attachment 13 hereto) at 9.

[417] *Id.* at 6, 8.

[418] *AT&T Corp. v. Qwest Corporation,* WUTC Docket UT-020388.

calls that were dialed direct from their line. All such calls were carried by Qwest. By extending the freeze to the intraLATA carrier, Qwest froze *itself* as the customers' carrier, thus negating the customers' ability to choose a carrier other than Qwest. Qwest rejected thousands of customers' orders to switch away from Qwest. AT&T, MCIWorldcom, and Nextlink all filed complaints regarding Qwest's action, and an ALJ found that the institution of the freeze violated Colorado law.[419] The Commission found that "USWC used its position as the sole 1+ intraLATA provider in its extensive service area to inhibit the entry of competitors into the intraLATA market and tangibly damaged the entering competitors."[420] The Commission also found that "USWC's abuse of its market position to inhibit and damage competition was anticompetitive."[421]

Inhibiting Entry. Qwest previously has denied AT&T access to inside wiring in multiple dwelling units ("MDUs), and in response to a complaint filed by AT&T, the WUTC, on April 9, 2001, ordered Qwest to promptly provide AT&T with access.[422] Qwest ripped out wires and conduit lawfully and properly installed by AT&T in various building access terminals located at the network interface device/minimum point of entry ("MPOE") terminals. Furthermore, Qwest padlocked boxes containing NID and other wiring, refused to negotiate access terms with AT&T and called the police when AT&T attempted to install its own wiring. Additionally, Qwest demanded non-viable, cost-prohibitive and commercially coercive methods for AT&T to obtain access to wiring inside the MDUs, such as insisting that such access required truck rolls by Qwest and that AT&T would have to reimburse Qwest its costs for each such truck roll. Such

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[419] *See Before the Public Utilities Commission of the State of Colorado,* Docket No. 99K-193T, Decision No. C00-301, March 22, 2000, citing Section 40-2-103. C/R/S/ as well as 4 *Code of Colorado Regulations* 723-25 ("Rule 25").

[420] *Id.* I.(E.)(2.).

[421] *Id.*

[422] *AT&T Communications of the Pacific Northwest, Inc.* v. *Qwest Corporation*, Docket No. UT-003120, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion for Summary Determination, issued April 9, 2001.

actions by Qwest in Washington and other states made it virtually impossible for AT&T to provide local residential service to customers located in MDUs.

Other CLECs, in various Qwest states, have raised similar issues concerning Qwest conduct that inhibits entry into the local exchange market. Some of these complaints have been withdrawn pursuant to confidential settlements that may involve agreements that should have been filed, but were not made public as required by Section 252. For example, SunWest Communications engaged in litigation with Qwest in August, October and November of 2000, alleging that Qwest, among other things, failed to provide interconnections in a timely manner. Qwest and SunWest entered into a confidential settlement of SunWest's complaint. Additionally, Rhythms Links, Inc., also filed a complaint against Qwest with the Colorado Public Service Commission regarding Qwest's discriminatory practices in offering ADSL-capable loops and ISDN-capable loops to CLECs.[423] In response and in settlement, Qwest began providing an ADSL-capable and an ISDN-capable loop to CLECs, but took nearly a year and impeded Rhythms' market entry throughout the Qwest region.[424] Scindo Networks similarly filed a complaint in Colorado, alleging that Qwest had repeatedly and intentionally violated the terms of its interconnection agreement on issues concerning collocation, dark fiber, and processing delays. Scindo Networks complained that Qwest's actions were intended to thwart competition from broadband competitors. According to a Stipulation for Dismissal, filed with the Commission on May 4. 2001, Qwest and Scindo Networks have entered into a confidential settlement regarding the complaint. Finally, in a ruling issued February 10, 1999, the WUTC

[423] *See Before the Public Utilities Commission For The State Of Colorado,* Rhythms Links Inc. (Complainant) v. U S West Communications, Inc. (Respondent), No. 99F-493T, October 7, 1999.

[424] Before the Public Service Commission of the State of Utah, *In the Matter of the Application of U S WEST Communications, Inc. For Approval Of Compliance With 47 USC § 271(d)(2)(B),* Docket No. 00-049-08, Affidavit of Valerie Kendricks, Rhythms Links, Inc., March 23, 2001, pp. 2-4.

found that Qwest-U S WEST had violated state laws and terms of its interconnection agreement by delaying MCI Metro from providing local phone service.[425]

In short, Qwest's pervasive efforts to avoid compliance with sections 251 and 252, when coupled with its past and ongoing violations of section 271, should provide the Commission with a strong conviction that Qwest is committed to entering the long distance market without committing itself to opening up its local markets. The Commission cannot be confident that Qwest will continue to open its local markets if the Commission grants this five-state Application.

C. Qwest Maintains Monopoly Power Over Residential Service.

Given the extensive pattern of Qwest noncompliance with the Act and its efforts to stall or prevent competition, it is not surprising that Qwest retains monopoly power over residential service in the five states covered by its application. In reviewing actual competition in the local market, the Commission reviews the extent to which new entrants "are actually offering" local service to both business and residential customers through each of the three means offered by the Act.[426] The "Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale."[427] As the Commission has recognized, its public interest analysis "must include an assessment of whether all procompetitive entry strategies are available to new entrants."[428] And, as the Commission explained in the *Michigan 271 Order*, "[t]he most probative evidence that all entry strategies are

[425] *MCIMetro Access Transmission, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-971063, Commission Decision and Final Order (Feb. 10, 1999). The WUTC found that U S WEST's practices imposed undue disadvantages on MCIMetro and granted unreasonable preferences to itself. Chairwoman Anne Levinson agreed with the majority opinion and also favored imposing substantial penalties against US WEST: "This is a consistent pattern of behaviors that all operated to U S WEST's advantage, gave it undue preferences, and subjected MCI to an undue competitive disadvantage and improper discrimination."

[426] Michigan 271 Order at ¶ 391.

[427] *Id.* ¶ 96.

[428] *Id.* at 387.

available would be that new entrants *are actually offering* competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large)."[429] In subsequent applications, the Commission has repeatedly considered the degree to which competitors have actually succeeded in offering local telecommunications services using the different entry strategies prescribed by the Act.[430]

Here, Qwest's own data – particularly after Qwest's over-estimate of CLEC facilities-based lines is corrected -- confirm that facilities-based and UNE-based entry is extremely limited or non-existent in Qwest's service territories. Qwest relies on two methods to estimate facilities-based entry – one using E911 data, and a second using local interconnection service ("LIS") trunk data.[431] For four of the five states (all but Iowa), the trunk data estimate is lower than the estimate based on E911 data. However, it is clear that even Qwest's estimate based on trunk data is inflated. In order to estimate facilities-based lines served by CLECs, Qwest multiplies the number of LIS trunks by a factor of 2.75.[432] In support of the 2.75 factor, Qwest cites SBC's use of the same factor in SBC's 271 applications for Texas, Kansas and Oklahoma.[433] What Qwest fails to mention is that SBC's use of the 2.75 factor was flatly *rejected* by the Department of Justice as "much too high":

> "Although we believe it is reasonable to use the number of interconnection trunks in order to estimate the number of CLEC access lines, SBC's factor

[429] *Id.* ¶ 391 (emphasis added).

[430] *See, e.g., New York 271 Order* ¶¶ 13-14; *Texas 271 Order* ¶¶ 5-6.

[431] Teitzel Decl. ¶¶ 35-40.

[432] Teitzel Decl. ¶ 39.

[433] *Id.*

of 2.75 appears to be much too high. A more reasonable multiplier, in our view, would be close to one . . . ."[434]

Using the data presented by Qwest witness Teitzel – but using the "more reasonable multiplier" of one to estimate CLEC facilities-based lines, Tables 1 through 10 show the amount of CLEC competition in the five states.[435] The Tables show that less than 3% of all switched access lines in Idaho (Table 3), Idaho (Table 5) and North Dakota (Table 9) are served by facilities-based competitors (less than ½ of 1% in North Dakota). Similarly, less than 3% of all switched access lines are served by UNE-based competitors in Colorado (Table 1), Idaho (Table 3) and Nebraska (Table 7), with less than 1% in Nebraska. There is even less competition for residential service. A mere 465 lines, or 1/10 of 1% of the residential lines in Qwest's Idaho service territory, are served by facilities-based competitors, and only 126 lines, less than 1/10 of 1% of such lines, are served by UNE-based competitors (Table 4). Similarly, 485 lines, or less than ½ of 1% of the residential lines in Qwest's North Dakota service territory, are served by facilities-based competitors, and only 550 lines, again less than ½ of 1% of such lines, are served by UNE-based competitors (Table 10). In four of the five states, less than 1% of residential lines in Qwest's service territory are served by UNE-based competitors (the exception being Iowa, where a mere 2% of residential lines are served by UNE-based CLECs).

Furthermore, even these minuscule shares present an overly optimistic picture of the likely future of CLEC competition in the five states. As reflected in Attachment 15, many of the

[434] DOJ Texas Evaluation at n. 15 (February 14, 2000).

[435] According to the Tables (Attachment 14 hereto): In Colorado, facilities-based CLECs have 6.8% and 3.1%, UNE-based CLECs have 2.8% and 0.5%, and resale CLECs have 1.5% and 1.4% of the total and residential lines, respectively. In Idaho, facilities-based CLECs have 2.0% and 0.1%, UNE-based CLECs have 2.1% and 0.0%, and resale CLECs have 1.7% and 1.8% of the total and residential lines. In Iowa, facilities-based CLECs have 2.7% and 2.2%, UNE-based CLECs have 10.2% and 2.0%, and resale CLECs have 1.5% and 1.3% of the total and residential lines. In Nebraska, facilities-based CLECs have 7.6% and 6.6%, UNE-based CLECs have 0.9% and 0.4%, and resale CLECs have 2.4% and 2.3% of the total and residential lines. In North Dakota, facilities-based CLECs have 0.6% and 0.4%, UNE-based CLECs have 10.6% and 0.0%, and resale CLECs have 3.9% and 4.2% of the total and residential lines.

facilities-based CLECs identified as competitors by Qwest have gone, or are going, out of business, or are in severe financial distress at the present time.[436] The prospects for increased UNE-based competition are also bleak, because entry into residential service will be impaired so long as UNE rates remain above a level that permits competitive entry.

If Qwest actually offered CLECs non-discriminatory access to the full economies of scale in its network, the Commission would see meaningful entry and competition from UNE-based entrants.[437] The microscopic level of UNE-based entry in these states is by degrees of magnitude smaller than the level achieved in other states where the FCC has granted section 271 applications. As the Table below demonstrates, the current level of UNE-based competition for residential service in Idaho and North Dakota is *less than 1 percent* of the levels of UNE-based residential competition that existed in Massachusetts, New York and Pennsylvania at the time the Commission considered section 271 applications for those states.

ID and ND Versus Other States – CLEC Residential Entry Via Facilities and UNE-P

	Idaho	**North Dakota**	**NY**	**PA**	**MA[438]**
UNE-P	41	115	137,342	197,000	8,050 (approx)
Facilities	465	485	35,753	95,000	80,000 (approx.)
TOTAL	**506**	**600**	**173,095**	**292,000**	**88,050 (approx.)**

Finally, resale is an inherently limited competitive vehicle, both because resale-based competitors cannot alter the nature of the service they are reselling (and thus cannot provide

[436] *See also* Teitzel Decl., Exhibits DLT-Track A/PI-CO-4;.DLT-Track A/PI-ID-4; DLT-Track A/PI-IA-4; DLT-Track A/PI-NE-4; DLT-Track A/PI-ND-4.

[437] Since the passage of the Act, however, all CLECs combined in Idaho have managed to gain just 41 UNE-based residential lines, CLECs in North Dakota just 115 such lines, and Nebraska just 1,269 such lines.

[438] *New York 271 Order* ¶ 14: *Pennsylvania 271 Order* at n. 260; *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, FCC 01-269, at 52 (June 21, 2001); Comments of AT&T Corp., *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, at 71 (filed July 11, 2001) (citing to Qwest Witness Taylor, Att. 1, Exhibit B); *Application of Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts, Memorandum Opinion & Order,* CC Docket No. 01-09, ¶ 64 (September 22, 2000).

competitors with innovative or improved services), and because resale is priced in a manner that precludes its use in all but the most selectively chosen circumstances.[439] The record thus shows that resale is not a growing, viable source of future competition for Qwest in the five states, and that no entrant has yet succeeded in using either UNEs or facilities to offer competitive local residential service.

D. Qwest's UNE Rates Preclude UNE-Based Entry In Idaho, Iowa and North Dakota.

The evidence shows that Qwest's UNE rates, at least in Idaho, Iowa and North Dakota, are so high that they preclude efficient local entry. Specifically, those rates effect a price squeeze that prevents UNE-based competitors from earning sufficient margins to provide local service economically in competition with Qwest, by imposing wholesale costs on Qwest's competitors that render it impossible for them to offer a retail service that would be price competitive.[440]

Qwest's imposition of rates that foreclose broad-based local competition has two independent legal consequences in this proceeding. *First*, as described above, it establishes that those rates violate Checklist Item 2 because they are discriminatory. *Second*, the direct evidence of a price squeeze also establishes that granting the application could not be consistent with the "public interest." 47 U.S.C. § 271(d)(3)(C). The Commission has held that the "public interest" prong of Section 271 requires it to "ensure that no other relevant factors exist that would frustrate

[439] The avoided cost discount has proved inadequate to provide CLECs a basis for profitable entry for most consumers. For example, as monopolists, the incumbents do not face (and therefore do not "avoid") the huge customer acquisition costs that CLECs confront. Nor does avoided cost pricing take into account the lack of economies of scale that a new entrant must address. And CLECs providing resale do not benefit from access revenue. For all of these reasons, CLECs seeking to provide a broad-based, significant competitive alternative to the incumbents' local residential monopoly cannot do so through the resale of local service.

[440] *See* Lieberman Decl. ¶ 43.

the congressional intent that markets be open."[441] The central purpose of section 271 is to ensure that local telephone markets in a state are open to competition – and that competing carriers therefore have the legal and economic ability to provide competing local services – before a BOC in that state is permitted to provide long-distance services. A price squeeze that would foreclose efficient local entry into the residential market obviously constitutes such a "relevant factor." And proof that such a factor in fact exists demonstrates conclusively that the market is not – and cannot be – open.

The Commission nonetheless had previously held that it need not consider evidence of a price squeeze in evaluating a section 271 application. That holding was based on the Commission's view that such evidence was "irrelevant," and that considering it would improperly involve the Commission in the process of setting local retail rates that are outside its jurisdiction.[442] But the United States Court of Appeals for the D.C. Circuit, relying on the Supreme Court's decision in *Conway*, has now squarely rejected that view.[443] Indeed, because the central purpose of the 1996 Act is "stimulating competition," the D.C. Circuit held that the "public interest" analysis under section 271 may weigh even "*more heavily* towards addressing potential 'price squeeze'" than was required under the Federal Power Act in *Conway*.[444] Under

[441] *Kansas/Oklahoma 271 Order* ¶ 267. The Supreme Court has explained that the statutory term "public interest" "take[s] [its] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). As the Commission has held, Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a time when their local monopolies would give them an "unfair advantage" over long distance competitors in, *inter alia*, providing "combined packages" of local and long distance service to customers who desire "one-stop shopping." *AT&T* v. *Ameritech*, 13 F.C.C. Rcd. 21438, ¶¶ 5, 39 (1998), *aff'd sub nom. U S WEST* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999). If, by contrast, long-distance entry were allowed before other carriers could provide competing combined packages, it would "threaten competition" in both the local and the long-distance markets by granting the BOC a monopoly in the provision of such combined services. *Id.* ¶ 5.

[442] *Id.* ¶ 92.

[443] *Sprint* v. *FCC*, 274 F.3d 549 (D.C. Cir. 2001).

[444] *Id.* at 564 (emphasis added). Moreover, the *Sprint* Court also confirmed that the Commission's lack of jurisdiction over retail rates was no bar to such an analysis, because the Commission can respond to a price squeeze without disturbing retail rates. Instead, because the Commission has said that TELRIC rates exist within a "band," one entirely permissible solution is to "'fix[] the wholesale rates, which [a]re under its jurisdiction, at a lower level

Sprint v. *FCC*, therefore, when evidence is presented in a section 271 proceeding that UNE-based residential competition is economically infeasible, the Commission cannot grant that application without evaluating and addressing that evidence. Unless the Commission rejects this application on other grounds, it must develop and apply a framework for analyzing AT&T's claims.

In the face of the D.C. Circuit's *Sprint* decision, Qwest raises several arguments, none of which have merit. Qwest claims that it is legally irrelevant that UNE-P purchasers cannot economically provide service under Qwest's existing UNE rates. Qwest relies on antitrust cases that purportedly hold that a price squeeze can exist only if "essential inputs" are not available at a "fair price."[445] Qwest claims that this standard cannot be met here because UNE prices are necessarily "fair" if they have been found to fall within the range that satisfies TELRIC. Furthermore, Qwest claims that UNE-P is in no way an essential input in that the Act makes available resale under section 251(c)(4) and a variety of other means to gain access to Qwest's network.

Qwest's claims are baseless. As an initial matter, Qwest misstates the applicable antitrust decisions. For example, *Alcoa* holds that a firm with monopoly control over an input essential to the provision of a finished product is engaged in a price squeeze and is not charging a "fair" input price if purchasers of the input cannot make a "living profit" from sale of the finished product – as purchasers of UNEs plainly cannot in Idaho, Iowa and North Dakota.[446]

within'" that band. *Id.* at 564 (citing *Conway*, 426 U.S. at 279). Here, because, as AT&T has shown, Qwest's rates are not TELRIC-compliant to begin with, there is certainly plenty of room for downward movement.

[445] Application at 186, n. 124.

[446] *United States v. Aluminum Co. of America,* 148 F.2d 416, 436-38 (2d Cir. 1945). In *Town of Concord v. Boston Edison*, 915 F.2d 17 (1st Cir. 1990), the court only held that allegations that electric utilities have set wholesale rates to effect a price squeeze "generally" will not state claims under the antitrust laws because, among other things, the governing regulatory statute requires FERC to determine if a price squeeze will result at the time it reviews the lawfulness of the utility's wholesale rates. *Id.* at 28.

The antitrust decisions cited by Qwest are simply besides the point here for a similar reason. Whether or not Qwest is also violating antitrust standards, section 271 bars the Commission from granting Qwest long distance authority unless the Commission finds (1) that the UNE rates are "nondiscriminatory" as well as cost-based, 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A)), and (2) that the grant of the application is in the "public interest." *Id.* § 271(d)(3)(C). As described above, in *Conway,* the Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility's retail services to any class of customers. Thus, if Qwest's high-end UNE rates foreclose UNE purchasers from economically providing residential competition, Qwest is engaged in "discrimination" and has not satisfied checklist item two. Because Section 271 categorically bars long distance authorization unless checklist item two has been "fully implemented," Qwest's arguments about the availability of resale or other means of access are irrelevant in this context.

Qwest's reliance on the purported availability of resale to respond to evidence that its high UNE prices have doomed UNE-based competitors to failure is also unavailing in the public interest context. To begin with, resale is irrelevant for this purpose. The wholesale discount that has been set in Idaho, Iowa and North Dakota is wholly insufficient to allow any firm to cover its internal costs of service, and no firm could economically provide local exchange service in these states through resale on a broad basis over time.[447] This is borne out by the paltry market shares currently enjoyed by resale-based competitors in Idaho, Iowa and North Dakota.

[447] Most notably, a competitor that provides services using resale is not entitled to receive either USF support or access revenues. Thus, its potential revenues are significantly reduced compared to providers that employ UNE-P.

More fundamentally, resale would be irrelevant even if the wholesale discount that has been set in these states was sufficient, for resale does not give a CLEC access to the "inputs" required to provide long distance service. In particular, firms engaged in resale are entitled to use the BOCs' facilities to provide only exchange service and not exchange access service. Resale thus has no effect on the BOCs' monopoly over the exchange access services that originate and terminate all long distance calls, and resale cannot eliminate a BOC's ability to leverage its monopoly into the long distance market.

Nor is there any other entry vehicle that is available to AT&T and other CLECs in Idaho, Iowa and North Dakota that could allow multiple CLECs to provide residential service throughout the state. As shown above, facilities-based providers serve less than ½ of 1% of residential access lines in Idaho and North Dakota and only about 2% in Iowa. Under these circumstances, the only theoretical alternative to UNE-P would be an arrangement in which firms would attempt to provide residential service by leasing unbundled loops from Qwest and combining them with the CLECs' switches to provide service. However, such a "UNE-L" strategy is now wholly uneconomic for this purpose in these states (and elsewhere). Quite apart from the fact that carriers cannot rationally invest in switches until they have used UNE-P to build up a customer base, Qwest and other BOCs have not deployed technology that allows customers to change from one local exchange carrier to another efficiently and effectively, in mass market quantities and at low cost. Instead, these changes require manual "hot cuts" which are expensive and which have proven impossible for Qwest and other BOCs to administer without causing unacceptable levels of service outages even when UNE-L is used only for low volumes of orders for business customers.[448]

[448] Finally, Qwest points to the Commission's decisions in the *Vermont 271 Order* and the *Georgia/Louisiana 271 Order*. Br. 187-88. However, these prior Commission decisions on the price squeeze issues were based on the

In sum, the lack of facilities- and UNE-based CLEC competition for service in the five states is due to Qwest's "failure to cooperate in opening its network to competitors" and the "existence of barriers to entry," *not* "the business decisions of potential entrants" that are independent of the entry barriers and BOC misconduct.[449] Nothing suggests that potential entrants have decided that the local markets in these five states, though open, are simply not worth pursuing, or "that competitive alternatives can flourish rapidly throughout the state."[450] The local markets in the five states are simply not open to competition, let alone irretrievably open.

E. Qwest's Performance Remedy Plans Are Inadequate To Demonstrate 271 Compliance.

The current record provides no basis for Qwest's claims that its performance enforcement plans will serve as effective deterrents against future backsliding.

There is no factual basis for Qwest's claims that its performance remedy plans contain a comprehensive set of self-executing remedies demonstrating that it will continue to provide CLECs with nondiscriminatory service in the wake of any Section 271 relief. Performance monitoring and enforcement mechanisms can "constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry would be consistent with the public

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records in those proceedings. As explained above, the record concerning Qwest's price squeeze here fully meets the standards for establishing a price squeeze that the Commission has identified in prior cases. The *Vermont 271 Order* (¶ 67) suggests that *Conway* may be inapplicable in this context. As *Sprint* v. *FCC* makes clear, however, the court that reviews the Commission's section 271 decisions disagrees. In any event, the suggested distinctions are specious. Establishing that UNEs, unlike the electricity at issue in *Conway*, have prices that may "vary by location" and are not "undifferentiated commodities" might impact the estimation of margins, but not the applicability of the legal rule that where a price squeeze is demonstrated, wholesale rates are discriminatory and contrary to the public interest. Nor is it relevant that "intentional state policy" may have caused wholesale rates to exceed retail rates; AT&T does not ask the Commission to interfere with (or even comment upon) state policy, but merely to determine whether a price squeeze exists and, if so, whether it would serve the public interest to grant a section application. And, as AT&T has repeatedly shown, and repeats here, resale requirements do not solve the price squeeze because, *inter alia*, the wholesale discounts available are also too small to allow profitable entry.

[449] *Michigan 271 Order* ¶ 391.

[450] *Id.* ¶ 392.

interest."[451] But the Commission has made clear that, when an applicant relies on a performance monitoring and enforcement plan to support its application, it will review the contours of that plan to assess whether it provides sufficient incentives for compliance with Section 271, stating:

> Where, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving Section 271 authorization, *we will review the mechanisms involved to ensure that they are likely to perform as promised. While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance.*[452]

Moreover, the Commission has identified certain key elements in a legitimate performance monitoring and enforcement plan. Thus, in the *New York 271 Order*, the Commission endorsed the New York performance assurance plan because it contained the following characteristics: (1) potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; (2) clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; (3) a reasonable structure that is designed to detect and sanction poor performance when it occurs; (4) a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and (5) a reasonable assurances that the reported data is accurate.[453]

Similarly, in its subsequent decisions reviewing Section 271 applications, the Commission has evaluated each performance remedy plan at issue based upon these same

[451] *New York 271 Order* ¶ 429. *See also Massachusetts 271 Order* ¶ 236; *Kansas/Oklahoma 271 Order* ¶ 273.

[452] *New York 271 Order* ¶ 433 (emphasis added). See also *Texas 271 Order* ¶ 423; *Kansas/Oklahoma 271 Order* ¶ 273.

[453] *New York 271 Order* ¶ 433.

characteristics.[454] Qwest's performance monitoring and enforcement mechanisms do not and cannot satisfy these criteria.

No anti-backsliding plan can be effective unless it is based upon a system of comprehensive and performance measurements producing accurate and reliable performance results that are coupled with enforcement mechanisms that can effectively deter Qwest from engaging in anticompetitive conduct. These conditions do not presently exist.

In this regard, the performance remedy plans on which Qwest relies are fundamentally flawed because Qwest's performance data that serve as the basis for the calculation of remedies payments are inaccurate and untrustworthy. Because the performance data which serve as the springboard for remedies payments are inaccurate, they fatally compromise the efficacy of the performance remedy plans. Even if Qwest's data were accurate, reliable and comprehensive – and they are not – the very structure of Qwest's remedy plans render them ineffective tools to deter anticompetitive conduct after any section 271 entry.

Contrary to Qwest's claim, the performance remedy plans are flawed in both their comprehensiveness and ability to capture actual performance. The performance remedy plans cannot possibly capture Qwest's actual performance because they omit measures that are necessary to detect discriminatory performance. The omitted metrics – which include measures on service order accuracy and functional acknowledgments – are neither trivial nor insignificant. Because the current performance remedy plans exclude these measures, Qwest will suffer no financial consequences for plainly discriminatory conduct.

Aside from these deficiencies, other provisions in Qwest's performance enforcement plans fail to provide sufficient incentives to assure that Qwest will fulfill its statutory obligations.

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[454] *See Texas 271 Order* ¶¶ 424-429; *Kansas/Oklahoma 271* Order ¶¶ 273-278; *Massachusetts 271 Order* ¶¶ 240-247; *Connecticut 271 Order* ¶¶ 76, 77.

In that connection, in every proceeding in which Section 271 approval has been granted, the Commission has found that the performance remedy plan adopted by the State commission was not "the only means of assuring that [the BOC] continues to provide nondiscriminatory service to competing carriers."[455] In these proceedings the Commission found that the BOC applicant "faces other consequences if it fails to sustain a high level of service to competing carriers, including: "federal enforcement action pursuant to Section 271(d)(6), liquidated damages under dozens of interconnection agreements, and remedies associated with antitrust and other legal actions."[456] However, the performance enforcement plan approved by the Idaho Public Utilities Commission *precludes* CLECs from obtaining such alternative forms of relief and is plainly contrary to this Commission's well-established precedent.

Similarly, this Commission has recognized the important role that state regulatory agencies must play in monitoring and enforcing a BOC's compliance with its statutory obligations after Section 271 relief is granted. Indeed, this Commission has emphasized that "state performance monitoring and post-entry enforcement"[457] mechanisms are "critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6)."[458]

In approving Bell Atlantic's New York 271 application, the Commission emphasized that the New York PSC was "committed to supervising the implementation of [performance assurance] plans" that were designed to assure that the markets remained open in the wake of

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[455] *Texas 271 Order* ¶ 424. *See also New York 271 Order* ¶ 430; *Georgia/Louisiana 271 Order* ¶ 296.

[456] *Texas 271 Order* ¶ 424. *See also New York 271 Order* ¶ 435; *Pennsylvania 271 Order* ¶ 130 n. 448; *Georgia/Louisiana 271 Order* ¶ 296.

[457] *Texas 271 Order* ¶ 420, n.1219 (emphasis added); *New York 271 Order* ¶ 429, n. 1316; *Kansas/Oklahoma 271 Order* ¶ 269, n. 828; *Massachusetts 271 Order*, ¶ 236, n. 757.

[458] *Texas 271 Order* ¶ 420.

Section 271 relief.[459] Because of the vital role that the New York PSC played and would continue to play in monitoring and adjusting the performance monitoring and remedy plan as needed, this Commission was confident that the New York monitoring and enforcement plan would be revised as needed "to reflect changes in the telecommunications industry and in the New York market."[460]

However, the Iowa performance remedy plan – which explicitly permits Qwest to challenge the authority of the State to make any changes to the plan – poses a significant risk that CLECs will be faced with protracted litigation whenever the State imposes a change that is not to Qwest's liking. If Qwest is free to challenge the authority of the State to make changes to the plan, Qwest could render the plan a static document that would never evolve at a pace that is consistent with the dynamics in the telecommunications market.

Qwest simply cannot have it both ways. Qwest should not be permitted to rely on a remedy plan for 271 approval, while simultaneously reserving the right to challenge the authority of the state to make any changes to that plan. Moreover, the reservation of such rights undermines the Commission's stated goal of having "self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention."[461] For all of these reasons, Qwest's performance enforcement plans cannot possibly meet the public interest requirements under Section 271.

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[459] *New York 271 Order* ¶ 12.

[460] *Id.*

[461] *Michigan 271 Order* ¶ 394.

CONCLUSION

For the foregoing reasons, Qwest's application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota should be denied.

Respectfully submitted,

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July 3, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of July, 2002, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 3, 2002
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/s/ Peter Andros
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Before the
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Washington, DC 20554

In the Matter of Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota	)	WC Docket No. 02-148

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TABLE OF CONTENTS

FCC ORDERS CITED

SHORT CITE	FULL CITE
BellSouth Louisiana II Order	Memorandum Opinion and Order, *Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599 (1998)
Georgia/Louisiana 271 Order	Memorandum Opinion and Order, *Joint Application of BellSouth Corporation et al. for Provision of In-Region InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35 (rel. May 15, 2002)
Michigan 271 Order	Memorandum Opinion And Order, *Application Of Ameritech Michigan Pursuant To Section 271 Of The Communications Act Of 1934, As Amended, To Provide In-Region, InterLATA Services In Michigan,* 12 FCC Rcd. 20543 (1997)
New Jersey 271 Order	Memorandum Opinion and Order, *Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in New Jersey*,WC Docket No. 02-67 (rel. June 24, 2002)
NY 271 Order	Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953 (1999)
Pennsylvania 271 Order	Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419 (2001)
Texas 271 Order	Memorandum Opinion and Order, *Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354 (2000)

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota	)	WC Docket No. 02-148

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota.

INTRODUCTION AND SUMMARY

Despite its flurry of last-minute (and still ongoing) amendments to its SGATs in Colorado, Idaho, Iowa, Nebraska and North Dakota, Qwest's Application unquestionably falls short of the core requirements of section 271 in a number of significant respects. These gaps are clear and largely undisputed. Qwest continues to discriminate in countless (and still largely undisclosed) respects in favor of its secret deal partners. As third party testing, performance data and, in a few respects, even state regulators' candid comments confirm, Qwest plainly has not yet attained OSS parity. Qwest's interconnection terms violate the Act in more than a dozen ways, including some that the Commission has already expressly recognized in other decisions. Qwest's non-recurring rates remain far above any reasonable TELRIC range, and its claims that it has reduced its Idaho, Iowa, Nebraska and North Dakota rates to Colorado levels are demonstrably false. The comments detail additional checklist and public interest shortfalls.

Indeed, the joint application falls short in more respects than *any* recent application for section 271 authority.

Qwest's instant application also is set apart from any other recent 271 application by Qwest's reliance on numerous deceptive tactics. For example, the Commission has on at least three occasions *adjudicated* Qwest (or US West before it) responsible for violating section 271 of the Act, and Qwest continues to violate Section 271. Qwest has demonstrated its disregard for its section 251 and 252 obligations, by, among other things, entering into patently discriminatory secret interconnection deals with favored CLECs, including deals in which Qwest attempted to evade informed state commission and FCC review of its compliance with section 271 checklist requirements by buying the silence of complaining CLECs in these regulatory proceedings. Qwest's efforts to inhibit local entry have also included "freezing" local service accounts to prevent customers from switching to competitive carriers, refusing to allow CLECs even to test competitive offerings and refusing to provide access to inside wiring in multiple dwelling units.

Qwest also uses misrepresentations and omissions to mask its failure to provide nondiscriminatory access to its OSS. Although Qwest extols the KPMG test of its OSS as proof that it has met its OSS obligations, KPMG found at the end of the testing that the OSS continued to be deficient in a number of areas (including the adequacy of Qwest's manual processing and testing environment) – but Qwest refused to allow any retesting to determine whether the deficiencies had been eliminated, notwithstanding KPMG's recommendation to the contrary, in order to force the testing to end on May 28 as scheduled. Moreover, Qwest conveniently ignores the fact that the results of the KPMG test were overstated, since some of the data and information on which KPMG relied was from CLECs who were given preferential treatment by Qwest under secret agreements.

Qwest's description of its OSS performance in the real-world context is equally misleading. For example, Qwest conveniently fails to mention in its application the high rates of CLEC orders that are rejected by its OSS, and the high rates of non-rejected orders that Qwest manually processes. In addition, as evidence that its manual processing of CLEC orders is accurate, Qwest included data in its application on "service order accuracy" that – in a subsequent *ex parte* – Qwest acknowledged was erroneous. By themselves, these misrepresentations render unreliable Qwest's claim that it has met the requirements of Section 271.

Qwest's pricing case is no better. Qwest initially filed testimony swearing that its rates in those four states did compare favorably to Colorado. But, after CLECs pointed out that Qwest's analysis was infected by numerous clear errors and that Qwest's rates in those states do not, in fact, pass the Commission's benchmarking analysis, Qwest frankly conceded that it made a fundamental error in its benchmarking analysis. Qwest's rates do not, in fact, satisfy the Commission's benchmarking analysis. Critically, rather than agreeing to address all of those problems, Qwest has continued its gamesmanship by reshuffling rate elements to different categories in the hope that it will pass the Commission's benchmarking test.

These are, of course, difficult times for Qwest, and many will urge the Commission to look past these fatal defects on the theory that Qwest simply cannot weather more bad news. The Commission must not do that. In this time of national resolve to establish and mandate corporate responsibility through effective government oversight, the Commission must find the resolve to deal squarely and forthrightly with Qwest's inadequate showing in this proceeding.

To be sure, the easy, non-confrontational course is to shift the analysis of Qwest's compliance with the Act's requirements to future proceedings, where monetary penalties could be assessed, or improvidently granted section 271 authority could be suspended or revoked. But the Act requires more responsible adherence to its terms. The Commission cannot sway from its statutory obligation to ensure that the record *in this proceeding* adequately supports the conclusion that Qwest *presently* complies with the checklist and public interest requirements, and has met its burden under Section 271. Under that standard, the joint application must be denied.

Although that would be the appropriate course on this record even if Qwest had sought interLATA authority in only a single state, the peril of deviating from the letter and core purposes of the Act is particularly stark here. In a transparent effort to finish its 271 race before complete testing, performance data and state and federal civil and criminal investigations expose even more problems, Qwest, in this and its follow-on application, seeks an unprecedented 10-state stamp of approval. If the Commission buys into this strategy, Qwest's section 271 incentive to complete the process of opening its local markets to competition will disappear virtually overnight. In short, this clearly is the time and the case for the Commission to demonstrate the courage of the convictions that underlie the Act. Doing so is not "unfair" to Qwest in any respect – Qwest's problems in this proceeding are entirely of its own making, and it will remain entirely within Qwest's power to take the remaining steps that are necessary to meet all of the pre-conditions to interLATA authority.

The remainder of these reply comments is organized as follows:

In Part I, AT&T explains that the record in this proceeding relating to Qwest's "secret deals" conclusively proves that Qwest is not providing nondiscriminatory access to its bottleneck local network facilities as required by multiple checklist items. Qwest indisputably provides better prices and other terms to some CLECs than others. Moreover, Qwest's special treatment of its secret deal partners has given an inflated and otherwise false view of Qwest's treatment of CLECs and of the openness of its local markets to competition. The efficacy of Qwest's OSS tests, for example, has been compromised, because they relied in material part on evaluation of service provided to favorably-treated carriers. And at the very same time, Qwest's approach of "buying off" CLECs that were bringing forward evidence of Qwest's many failures to adhere to the Act's market opening requirements has subverted the entire Section 271 process. Under these circumstances, Qwest cannot possibly establish nondiscrimination, and that fact alone precludes granting the joint application.

Part II shows that the comments overwhelmingly confirm that Qwest has failed to satisfy its burden of providing that its OSS systems are non-discriminatory. Qwest fails to provide an adequate change management process. As explained by KPMG, many of the provisions of Qwest's "redesigned" CMP are too recent to evaluate, and Qwest provides no hard evidence of its compliance with its 'new and improved' change management process. Qwest likewise fails to provide a stable test environment that mirrors, but is separate from, the production environment.

The comments further confirm that Qwest's interfaces fail to provide CLECs with access to OSS functionality that is equivalent to that which Qwest enjoys in its retail operations. Qwest fails to provide nondiscriminatory access to pre-ordering in numerous respects: (1) Qwest has not provided CLECs with the ability to integrate EDI ordering and ordering functions successfully (2) Qwest has not shown that it provides CLECs with nondiscriminatory access to the same loop qualification information that is available to Qwest itself; (3) Qwest has not provided CLECs with the ability to perform (or have performed) mechanized loop testing before actual provisioning; and (4) Qwest fails to provide nondiscriminatory access to pre-ordering functions, because it changes due dates for CLEC orders far more frequently than for its own retail orders.

Likewise, Qwest fails to provide nondiscriminatory access to ordering and provisioning functions. Qwest's systems are plagued by high-rates of order rejection, manual processing of electronically submitted CLEC orders, and manual errors. Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete. Qwest's billing systems are patently inadequate. Qwest does not provide complete, accurate, and timely daily usage files ("DUFs") and wholesale bills to CLECs. In addition to the numerous billing errors that AT&T described in its opening comments, for example, Eschelon states that *all* of its bills for UNE-Eschelon/UNE-Star (which represents approximately 60 percent of Eschelon's total bill amounts) have been inaccurate, and that its DUF records do not include minutes of use for intraLATA toll traffic carried by Qwest.

In addition, the comments confirm that Qwest's performance data are inaccurate and unreliable and cannot reasonably be considered a reflection of Qwest's actual performance. The Liberty and Cap Gemini Ernst & Young performance measurement audits were not designed to test and did not test the accuracy of Qwest's raw data inputs; the study objective of the Liberty data reconciliation was fundamentally flawed, and the study itself was extremely limited as to temporal, geographical, product and measurement scope. According to the Idaho PUC, KPMG's OSS "testing revealed an unacceptably high level of human error in the manual processing of orders," and "the problems persisted" after retesting. Against this backdrop, there is no sound basis upon which Qwest can reasonably contend that the KPMG OSS test or the other audits and data reconciliation processes upon which it relies somehow validated the accuracy of its performance data.

Even Qwest's inadequate and unreliable data show that it has not satisfied its checklist obligations. Qwest's rejection rates are unacceptably high by any commercial standard. As demonstrated by the comments, Qwest's total flow through rates are inadequate and rely excessively on manual processing which increases the risk of provisioning error and delay. And Qwest also fails to provide timely, accurate and complete status notices.

Part III shows that the commenters, the DOJ, and even Qwest itself confirm that Qwest has failed to satisfy its burden of proving that its rates comply with Checklist Item II. Qwest relies on a benchmarking analysis against Colorado to justify its rates in the other four states in its application. But Qwest has now conceded that its rates in some of those states do not, in fact, satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state. Rather than withdrawing its application, Qwest is now scrambling to file new rates for those states. Even worse, Qwest's description of the new rates that it plans to file confirm that Qwest does not plan to actually lower its rates sufficiently to address the errors identified by the commenters and the DOJ. Instead, Qwest plans to reduce some rates, and to move other rates to different cost categories so that those rates will no longer affect the benchmarking analysis. This shell game cannot change the dispositive fact that Qwest's rates in four of the five states were not developed based on TELRIC principles and do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.

Moreover, the comments confirm that Qwest's Colorado recurring and non-recurring rates are inflated by TELRIC errors that substantially inflate those rates. Thus, even if the rates in the other four states were equivalent to those in Colorado (which they are not), that analysis would not show that the rates in those states are TELRIC-compliant. The fact that the rates in some of the states in Qwest's Application are overstated is further confirmed by the fact that local entry is not economically feasible. On this record, there can be no finding that Qwest's rates comply with Checklist Item 2.

Part IV addresses two recent developments that further confirm, as AT&T demonstrated in its initial comments, that Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, in violation of its checklist obligations. First, the Commission has now confirmed in the *Virginia Arbitration Order* that the exception to the unbundled switching requirement for customers with four or more lines "applies on a 'per location' basis," and not on a "per-customer per wire center" basis, as Qwest's SGATs provide. Second, Covad has demonstrated that Qwest's refusal to build facilities for CLECs on the same terms that it builds for itself is discriminatory and unlawful: When facilities are not available, rather than holding the order as it does for its retail customers, Qwest simply rejects the order (either immediately, as in Idaho, Nebraska, and North Dakota, or after 30 days, as in Colorado and Iowa).

Part V shows Qwest has failed to meet its burden of establishing that Qwest and its section 272 affiliate will comply with each of the requirements of section 272 if Qwest's application is granted. None of the state commissions even addresses Qwest's failure, as found by the Minnesota ALJ, to present evidence that it does not and will not jointly own switching and transmission facilities, either directly or indirectly, with its section 272 affiliate. Nor do the state commissions rebut the fact that Qwest and its section 272 affiliate fail to comply with the requirement that they have "separate officers, directors, and employees," as found by the Minnesota ALJ. The state commissions are also silent with respect to the Minnesota ALJ's finding that Qwest was in violation of section 272(b)(5)'s requirement of "arm's length" transactions, because both Qwest and its section 272 affiliate depend on their joint parent, QSC, to provide legal, public policy, and financial services for all their transactions. And no commenter addresses Qwest's failure to establish that it will comply with its nondiscrimination obligations under section 272(c) and with the joint marketing restrictions of section 272(g).

Part VI shows that granting the joint application is not in the public interest. As AT&T and other commenters demonstrated, Qwest has engaged in a pattern of discriminatory and anticompetitive conduct that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Qwest has engaged in a pervasive effort to forestall competition in its local exchange markets at the same time that it has launched illicit efforts to provide service across LATA boundaries. In a variety of states and a variety of ways, Qwest has been responsible for inhibiting local entry, having been adjudicated "guilty" for, among other things, repeatedly violating section 271 and refusing to permit UNE-P testing or to provide access to inside wiring in multiple dwelling units. And Qwest has been revealed to have entered patently discriminatory secret interconnection deals. By failing to file the agreements as required by Section 252, and worse yet, by attempting to evade informed state commission and FCC review of its compliance with Section 271 checklist requirements by purchasing with these secret discriminatory deals the silence of complaining CLECs, Qwest has made it clear that there is no reason for the Commission to give it the benefit of the doubt in its review of this unprecedented application.

Finally, Qwest's performance enforcement plans do not provide sufficient assurance that Qwest will comply with its statutory obligations in the future. The state regulatory commissions simply do not come to grips with AT&T's showing that the unreliability of Qwest's performance data, which serve as the springboard for remedies payments, would thwart the efficacy of the performance assurance plans. And even if Qwest's performance data were accurate, Qwest's performance assurance plans contain fundamental flaws that prevent them from serving as an effective deterrent against future backsliding. Qwest's initial five state joint application should be denied.

I. QWEST'S PERVASIVE AND ONGOING SECRET DEALS DISCRIMINATION REQUIRES THAT THE COMMISSION REJECT THESE APPLICATIONS.

The comments confirm that the Commission cannot approve Qwest's Application on the existing record because of the overwhelming "secret deals" evidence that Qwest is not, as required by multiple checklist items, providing nondiscriminatory access to its bottleneck local network facilities.[1] Moreover, because it is now clear that in some cases, the favored CLECs agreed in return to acquiesce in proceedings before state commissions and this Commission with respect to Qwest's instant section 271 Applications, Qwest has prevented full development of the regulatory record. By buying the silence of CLECs, Qwest has rendered the record on critical issues such as checklist compliance unreliable, and like the thirteenth chime of a clock, has cast the entire review mechanism into doubt. Worse still, the record evidence of Qwest's commercial performance and other obligations has been skewed by data from secret deals partners that received special treatment that is not available to other CLECs, rendering this evidence useless in determining Qwest's present checklist compliance. Under these circumstances, the Commission cannot make a reasoned finding of checklist compliance that would survive judicial review.

The comments remove any possible doubt that Qwest has entered into blatantly discriminatory agreements with favored CLECs, giving them preferential UNE rates and superior

[1] *See* 47 U.S.C. §§ 271(c)(2)(B)(i) (incorporating the non-discrimination obligations of sections 251(c)(2) and 252(d)(1)), 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii), (xiv) (incorporating the non-discrimination obligations of sections 251(c)).

access to UNEs to the competitive detriment of all others.[2] In addition, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.[3] Indeed, as AT&T demonstrated, the Iowa Utilities Board and the Arizona Commission Staff have now issued decisions concluding that Qwest entered into interconnection agreements with individual CLECs that granted them preferential rates, terms and conditions (thereby discriminating against other CLECs) and also violated section 252(a)(1) and applicable state rules by failing to file these agreements with the state commissions.[4] The Arizona Commission Staff further noted the "egregious nature of [Qwest's] infraction" with respect to seven agreements which had provisions "in which CLECs agreed that they would not participate in regulatory proceedings before the FCC," including Section 271 proceedings.[5]

Qwest's ongoing secret deals discrimination – the existence of which cannot be disputed – is fatal to its Application. As several commenters point out, the secret agreements, which blatantly favor some CLECs over others, are a patent violation of Qwest's obligation to provide "access" to its network facilities on terms and conditions that are "nondiscriminatory," 47 U.S.C. § 271(c)(2)(B)(ii), and likewise of the other checklist items that require nondiscrimination.[6]

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[2] *See* CompTel Comments at 14-15; New Edge Comments at 3-4; Touch America Comments at 24-25.

[3] *See* Touch America Comments at 24-25.

[4] *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2 (May 29, 2002) ("Iowa Order") (Attachment 3 to AT&T's Comments); *Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002) ("Arizona Report") (Attachment 4 to AT&T's Comments).

[5] Arizona Report at 1-2, 19.

[6] *See* CompTel Comments at 14 (If Qwest granted preferential treatment to selected CLECs, "then Qwest has not provided non-discriminatory access to unbundled network elements as required by checklist item ii"); New Edge Comments at 3-4 (citing two unfiled agreements between Qwest and CLECs as examples of "instances where Qwest does not provide access to network elements on rates, terms and conditions that are just, reasonable and nondiscriminatory"); Touch America Comments at 24 (Qwest's secret agreements "hav[e] an anti-competitive and discriminatory impact on competitive carrier operations").

DOJ acknowledges that the allegations of discrimination are "serious and deserve the Commission's careful attention."[7] It nevertheless concludes that "such allegations of past discrimination do not appear to implicate the Department's inquiry into whether local exchange markets are fully and irreversibly open to competition for purposes of providing its Evaluation of a pending Section 271 application to the Commission."[8] That conclusion simply ignores the mounting evidence that Qwest's discrimination is *ongoing*, not a *past* practice that has terminated. The state investigations are in progress and there is no basis to assert that Qwest has ceased entering into or performing under discriminatory agreements. Indeed, state commissions are still trying to identify all of Qwest's unfiled agreements through data requests and subpoenas.[9] If – as is clearly the case – Qwest continues to discriminate in the provision of interconnection and access to network elements, there is plainly no basis for a Commission finding that Qwest is presently offering interconnection and access to network elements on a *non*discriminatory basis.

Any suggestion that the Commission can ignore Qwest's discrimination in this proceeding and, instead, address it "through dockets in which such matters are directly under investigation," flies in the face of section 271.[10] The fundamental purpose of the section 271 approval process is for the Commission to consider precisely these issues. Section 271 expressly provides that "[t]he Commission *shall not approve* the authorization requested . . . unless it finds that" the applicant has "fully implemented" the requirements of the competitive checklist.[11] By

[7] DOJ Eval. at 3.

[8] *Id.* at 3-4.

[9] *See* Iowa Order at 21 (ordering Qwest to "file any other non-filed interconnection agreements with the Board" within 60 days); Arizona Report at 20 n.4 ("These recommendations should also apply to agreements subsequently submitted by CLECs (in response to Staff data requests) which Qwest may not have filed and which Staff determines should have been filed by Qwest under Section 252(e).").

[10] DOJ Eval. at 3.

[11] 47 U.S.C. § 271(d)(3) (emphasis added).

requiring that all checklist requirements are satisfied *before* the BOC enters the long-distance market, section 271 ensures that BOCs do not enter the long-distance market at a time when they are able to leverage their local monopoly power into the long-distance market. Accordingly, DOJ's suggestion that the Commission should address Qwest's discrimination in other proceedings and, if it later finds a violation, levy sanctions including "suspension or revocation of any Section 271 authority that the Commission may have granted in the interim," plainly has the cart before the horse.[12] The Commission has a statutory obligation to address the allegations in *this* proceeding, and cannot grant the joint application with respect to *any* state unless it concludes that Qwest currently is satisfying all checklist obligations.

Several commenters agree that Qwest's secret deals discrimination precludes approval of its section 271 Applications because the regulatory records, before both state commissions and this Commission, are unreliable.[13] Significantly, DOJ acknowledges the "questions as to the quality of the record," noting that "[p]erformance data relating to the CLECs that are alleged to have received preferential treatment are included in the aggregate data included in Qwest's filing and were relied upon by KPMG" during portions of the OSS test.[14] DOJ further acknowledges that "[t]he three-year process [of gathering performance data] might well have been more efficient and comprehensive with the full and open participation of all interested CLECs."[15] Despite these acknowledgements, however, DOJ concludes that "the fact that certain CLECs did

[12] DOJ Eval. at 3.

[13] Comptel Comments at 15 (asking the Commission to "separate Qwest's wholesale performance data for carriers that are alleged to have unfiled interconnection agreements from the aggregate wholesale performance results" because "carriers that might have received different wholesale performance from Qwest could skew Qwest's overall performance in a positive direction"); New Edge Comments at 4 (noting that Qwest's agreement with CLEC to provide Qwest personnel on-site to assist with OSS issues "calls into question the results of Qwest's OSS testing and performance results" because "these results are likely to be more favorable than what the competitive provider would have experienced without the Qwest personnel on site"); Touch America Comments at 25 ("the secret CLEC agreements have denied the states and the Commission the opportunity to develop a full and complete record for reviewing Qwest's requests for 271 authority").

[14] DOJ Eval. at 4.

not participate does not appear to have had a significant impact on the result."[16] This conclusion is wholly unsubstantiated. Indeed, it could not be substantiated because DOJ cannot know what the CLECs who were bought off *would have contributed to the record* if they had not been silenced or how much Qwest's special treatment of its secret deals partners skewed the performance and other data.

Nor can there be any serious suggestion that the burden is upon commenters to prove the scope of the discrimination and harm to the record caused by Qwest's secret deals misconduct. Qwest has, of course, made that impossible by refusing to disclose the full nature of its discrimination and insisting that this proceeding go forward before KPMG and state commissions could conduct the full investigations that would be required to eradicate the secret deals distortion. In any event, it is *Qwest's* burden here to prove checklist compliance, and it is Qwest that is attempting to rely upon performance data and state commission findings that it knows were distorted by its misconduct. It is therefore Qwest's burden to prove that its pervasive discrimination had no material impact on the evidence upon which it attempts to rely. Qwest has not even attempted to do so.

DOJ also asserts that "any enhanced performance caused by the allegedly preferential treatment will have resulted in higher benchmarks for Qwest to maintain."[17] This again ignores that the fundamental purpose of section 271 is to prevent Qwest from entering the long-distance market in the first place unless and until Qwest meets its burden of satisfying all checklist requirements, which it cannot do if the record of its current performance is unreliable. If the Commission were to prematurely approve the joint application on the basis of skewed or

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[15] *Id.* at 5.
[16] *Id.*
[17] *Id.*

inaccurate performance data – and in the process send a message to the industry that section 271 application will be approved notwithstanding such misconduct – then "higher" benchmarks would be of little use in preventing Qwest (or, for that matter any RBOC) from exercising monopoly power in the long-distance market. The bottom line is this: it is undisputed that Qwest has been – and is – discriminating, and there is no rational basis for the Commission to conclude that this discrimination is immaterial or that Qwest has met its checklist burdens despite that discrimination.

Qwest's failure to fully disclose the nature of its secret deals has a second and independent consequence: it violates Commission Rule 1.17. Rule 1.17 states that "[n]o applicant . . .shall . . . *in any application*, pleading, report or in any other written statement submitted to the Commission, make any misrepresentation or willful material *omission* bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. 1.17. Moreover, both the D.C. Circuit and the Commission have emphasized that the duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. *See Rainbow Broadcasting Co.*, 13 FCC Rcd. 21000, ¶ 25 (1998); *Swan Creek Communications* v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994). As explained above, there is no question that any documents or other written evidence relating to Qwest's secret deals with CLECs are material to this proceeding. Indeed, that material is necessary to fully assess the scope and extent of the discrimination caused by those secret deals. And those documents must be made available to, and reviewed by this Commission or the state commissions before any reasoned finding can be made that Qwest has complied with the competitive checklist, or that a grant of Qwest's application is in the public interest.[18] Qwest's failure to include with its

[18] The Commission recently noted the importance of a full Section 271 record. In fining SBC for misstatements in its Kansas/Oklahoma section 271 application, the Commission emphasized that "[s]ection 271 proceedings are at the

application the content of the secret deals it has entered into with selected CLECs leaves the Commission uninformed of information that is material to Qwest's Application.[19] Qwest's application is therefore deficient and must be denied.

II. QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO OSS.

The comments confirm that Qwest fails to provide an adequate change management process, a stable test environment that mirrors (but is separate from) the production environment, and the same access to OSS functions as that enjoyed by its own retail operations.[20] Remarkably, even the statements of some of the state regulatory commissions that have blessed Qwest's OSS demonstrate that Qwest is *not* currently meeting those obligations. All too often, however, the state commissions excuse discrimination and poor performance by Qwest, either by asserting that they will monitor Qwest's performance in the future or by citing to the current (or possible) inclusion of certain performance metrics in Qwest's performance assurance plans to ensure that Qwest will meet its obligations in the future.[21] These rationalizations are simply

center of Congress' efforts to promote competition in the Telecommunications Act of 1996. They are the subject of significant litigation. For SBC to keep the parties and the Commission uninformed of material inaccuracies relating to its Section 271 application is extremely serious." *See SBC Communications, Inc.*, Notice of Apparent Liability For Forfeiture and Order, FCC 01-308, ¶ 59 (released October 16, 2001).

[19] Moreover, the law ordinarily teaches that "the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." WIGMORE ON EVIDENCE § 285 (1940); *see also* McCORMICK ON EVIDENCE § 272 (1984) (espousing the "classic" statement of the law to be that "if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable" (footnote omitted)).

[20] *See* AT&T at 28-46; CompTel at 3-7; Covad at 13-31, 39-42; Eschelon at 6-28; New Edge at 4-5; Touch America at 4-5; Vanion at 7-8; WorldCom at 1-23.

[21] *See, e.g.*, CPUC at 38-39, 42, 51; IPUC at 6-7, 11-12; NDPSC Consultative Report at 203. To the extent that the bases offered by the State commissions for their finding that Qwest meets its OSS obligations are the same as those advanced by Qwest in its Application, they have already been addressed by AT&T in its opening comments, and will not be addressed here.

irrelevant to the issue of whether – as Qwest must establish – Qwest has met its burden to establish that it is *currently* in compliance with its OSS obligations.[22]

The comments also show that third-party testing of Qwest's OSS by KPMG Consulting ("KPMG") is of no real-world value because the results were based on input from CLECs which received preferential secret deals treatment from Qwest that is not available to other carriers.[23] The KPMG test results thus clearly overstate Qwest's actual performance. Moreover, the state commissions that claim that the KPMG test shows that Qwest is providing nondiscriminatory access ignore KPMG's own disclaimer that it could make no such determination.[24] In any event, "KPMG continued to deem Qwest's performance unsatisfactory with respect to a number of important issues," and the KPMG test "ended with a number of important issues unresolved because Qwest unilaterally determined that certain issues should not be retested."[25] There is no basis on this record for a Commission finding that Qwest has met its OSS burden.

A. Qwest Has Neither Established, Nor Adhered To, an Adequate Change Management Process.

The comments confirm that Qwest's change management process ("CMP") is inadequate under the standards established by the Commission. First, Qwest has not established that it has

[22] *See, e.g., Michigan 271 Order* ¶¶ 55, 179 (BOC's promises of future compliance are irrelevant to issue of whether BOC is currently in compliance with Section 271).

[23] AT&T at 29-30; New Edge at 4; WorldCom at 4. The CPUC attempts to minimize the effect of the secret agreements on the results of the KPMG testing, asserting that KPMG did not have "any concerns about the information" but considered the issue only as a "pro-active" effort in anticipation "that questions would arise." CPUC at 40-41. That is wrong. Even though its "CLEC participation study" focused on only three of the CLECs who received preferential treatment from Qwest, KPMG acknowledged that some of the findings and conclusions in its Final Report were based, at least in part, on information and data obtained from these CLECs. *See* AT&T at 30 & Finnegan/Connolly/Menezes Decl. ¶¶ 16-17 & Atts. 2-3. Moreover, KPMG acknowledged that it had not audited the accuracy and completeness of the data received form these CLECs, had not investigated whether such data were consistent with data held by other CLECs, and had not reviewed any of the secret agreements. *Id.* KPMG nonetheless declined to determine the precise impact of the secret agreements on the test results, despite AT&T's express request that it do so. AT&T at 30 & Finnegan/Connolly/Menezes Decl. ¶ 18 & Atts. 4-6.

[24] *See* CPUC at 2; IUB at 32; NDPSC at 7; AT&T Finnegan/Connolly/Menezes Decl. ¶ 15.

[25] WorldCom at 3. *See also* AT&T at 30.

"adhered to this process over time."[26] Second, Qwest has not met the Commission's requirement that it establish a stable testing environment that mirrors, but is separate from, the production environment.[27] Because a change management process "can make or break competition,"[28] these deficiencies in Qwest's CMP, by themselves, require denial of the Application.

Failure to Demonstrate Adherence to an Adequate Change Management Process. As KPMG's Final Report confirmed, many of the provisions of Qwest's "redesigned" CMP are too recent, or not yet mature enough, to evaluate.[29] Qwest's application "provides no hard evidence of its compliance with its 'new and improved' change management process," but simply engages in "an extensive discussion of administrative milestones that it has met and promises about how it will comply with the [CMP] on a prospective basis."[30] For that reason, the state commissions' discussion of CMP compliance is necessarily cursory and unaccompanied by any basis or evidence to support their recommendations.[31] Although some state commissions attempt to

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[26]*New Jersey 271 Order*, App. C ¶ 40; *Georgia/Louisiana 271 Order*, App. D ¶ 40; *Texas 271 Order* ¶ 106; *New York 271 Order* ¶ 102.

[27]*New Jersey 271 Order*, App. C ¶ 42; *New York 271 Order* ¶¶ 109-110.

[28]Nebraska Public Service Commission, Application No. C-1830, *In the Matter of Qwest Corporation, Denver Colorado, filing its notice of intention to file Section 271(c) application with the FCC and request for Commission to verify Qwest Corporation's compliance with Section 271(c)*, Order Approving Qwest's Change Management Process, entered June 12, 2002 ("NPSC CMP Order"), at 5 (¶ 16). *See also, e.g., New Jersey 271 Order*, App. C ¶ 41 ("Change management problems can impair a competing carrier's ability to obtain nondiscriminatory access to UNEs, and hence a BOC's compliance with section 271(2)(B)(ii)").

[29]AT&T at 31-35; CompTel at 7; Eschelon at 27-28;; New Edge at 4; WorldCom at 20.

[30] CompTel at 7.

[31]*See* CPUC at 52-53 (asserting only that Qwest "has adhered to" the bulk of the provisions of the CMP that "have been in place for months," that Qwest has implemented provisions of the CMP "[a]s language was agreed to in the redesign process," and that Qwest has followed "the basic process of prioritization" for two releases); IPUC at 12 (stating only that "there is a record of following individual elements of the process as agreement was reached on each element"); IUB at 39 (simply citing previous decision finding "that Qwest satisfied the requirements related to the CMP"); IUB Docket Nos. INU-00-2 and SPU-00-11, Conditional Statement Regarding Change Management Process Compliance, dated June 12, 2002, at 21-30 (rejecting CLECs' arguments regarding lack of compliance, but providing no basis for finding that Qwest had met its burden of providing a pattern of compliance); NPSC CMP Order at 3 (claiming that Qwest compiled an "overall compliance rate" of 98 percent – without specifying any basis or description for the 98 percent figure); NDPSC Consultative Report at 174 (finding that Qwest had established pattern of compliance by performing such tasks as "conducting meetings to clarify CLEC change requests" and by assigning a "pattern of quickly implementing the agreements reached in the redesign process"). The fact that Qwest implemented a particular element of the CMP once language was agreed upon begs the question of whether Qwest

dismiss as irrelevant or immaterial the inability of KPMG to determine Qwest's compliance with the CMP (others do not address KPMG's compliance findings at all),[32] the IUB acknowledges that the "adherence that KPMG was able to observe appeared to be 'piece-meal' rather than end to end."[33]

Given the findings of both KPMG and Cap Gemini in their third-party testing that the CMP is too new to determine whether Qwest had established a pattern of compliance, it is clearly "too early to conclude that Qwest is complying with the redesigned process." [34]

Inadequate Test Environment. The comments likewise confirm that neither of Qwest's testing environments meets the requirement that a BOC provide a stable testing environment that mirrors the production environment and is physically separate from it.[35] Qwest's "Interoperability Environment" is not separate from the production environment because it uses actual production systems, and fails to mirror the production environment because it returns all

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has adhered to that element "over time." Stated otherwise, implementation is meaningless without actual compliance.

[32] Although the Idaho PUC acknowledges the comments on this issue filed in its proceedings by AT&T regarding the KPMG test, the IPUC's discussion of the compliance issue makes no reference to the KPMG test. IPUC at 6, 12 & Exh. E at 25-26. Nor do the Nebraska or North Dakota commissions consider KPMG's findings in their analyses of Qwest's compliance with the CMP. NPSC CMP Order at 3 (¶¶ 7-8); NDPSC Consultative Report at 174. Although the Colorado PUC and Iowa Utilities Board address the findings of the KPMG test, their reasons for finding them insufficient to warrant a finding of noncompliance are not only without merit, but inconsistent. For example, although the IUB (like Qwest) asserts that KPMG's Exception 3094 regarding Qwest's compliance with the "product/process" CMP is outside the scope of Section 271, the CPUC finds that a CMP is *not* complete absent such a CMP. The CPUC nonetheless finds Qwest in compliance by citing (without elaboration) its "own evaluation" of product/process notifications by Qwest since April. CPUC at 48; IUB at 21. As one of its bases for rejecting KPMG's Exception 3111 (regarding Qwest's failure to provide notifications of changes in a consistent and timely manner), the CPUC even offered the rationalization that "In all likelihood, KPMG would have found that Qwest satisfied this criterion *given another month or two of testing.*" CPUC at 46 (emphasis added).

[33] IUB at 27. Although finding that Qwest "has compiled an adequate record of compliance with the redesigned CMP," the Nebraska PSC expressed concern regarding Qwest's local service freeze, which Qwest implemented even though "CLECs had not been informed" and "Qwest's front line people had little or no knowledge of the changes." *See* NPSC CM Order at 3 (¶ 8); NPSC Comments, Concurring Opinion of Commissioner Boyle at 2. *See also* AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 76-80 (describing AT&T's inability to have local service freezes removed despite adherence to Qwest's documented processes).

[34] Eschelon at 28. *See also* AT&T at 6-8; WorldCom at 19-20 & Lichtenberg Decl. ¶¶ 76-77.

[35] AT&T at 35-38; WorldCom at 20-23; *Georgia/Louisiana 271 Order* ¶ 187; *Texas 271 Order* ¶ 32.

responses to CLEC transactions manually, regardless of whether they are returned in automated form in actual production.[36]

SATE, Qwest's alternative test environment, is unstable, because SATE releases may differ from those actually implemented in production.[37] Moreover, SATE does not mirror the production environment. First, the responses returned to CLECs may differ from those received in actual production. Second, in contrast to their experience in actual production, CLECs using SATE must choose a "path" for the response that will determine the time within which it will be returned.[38] Third, SATE does not support many of the products that Qwest actually makes available in the production environment, and requires CLECs (like AT&T) which seek the inclusion of additional products in SATE to follow the time-consuming procedure of submitting a change request. For example, An evaluation that Hewlett-Packard conducted in connection with the third-party testing of Qwest's OSS in Arizona found that SATE Release 8.0 supported only 34 (or 47.5 percent) of the 80 products that Qwest offered. *See* Hewlett-Packard "Report 7, Products Offered in AZ," dated December 21, 2001 at 5 (attached hereto as Attachment 1). The products not supported by SATE include line splitting, loop splitting, BRI ISDN, Qwest DSL, Centrex 21, and unbundled analog DID/PBX trunk port and trunk port facility. AT&T submitted two change requests in January 2002 to add line splitting and loop splitting to SATE, but those requests still have not been implemented, even though they have been prioritized. In fact, because the priorities voted for AT&T's CRs were not sufficiently high to make the "cut" for the next scheduled SATE release (Release 11.0), they likely will not be implemented until March 2003, when SATE Release 12.0 is scheduled for implementation. Similarly, Qwest has not

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[36] AT&T at 35; WorldCom at 20-21. In addition, CLECs can use the Interoperability Environment only to the extent that they submit actual production accounts. WorldCom at 21; AT&T Finnegan/Connolly/Menezes Decl. ¶ 85.

[37] AT&T at 35-36.

implemented any of the nine change requests that it submitted in early 2002 for the inclusion of additional products in SATE (and did not subsequently withdraw). Qwest has scheduled only two of those nine change requests for implementation. *See* Notarianni/Dohorty Decl. ¶¶ 767-768.

These failures of SATE to mirror actual production resulted in the issuance of two exceptions by KPMG and to KPMG's conclusion in its Final Report that Qwest did not make available a "functional test environment" to CLECs.[39] More importantly, given these deficiencies, SATE clearly does not satisfy the Commission's requirement that it "perform the same key functions" as the production environment.[40]

The state commissions conclude that SATE is adequate, but their analyses show precisely the opposite. The Colorado PUC acknowledges that (1) the test environment issue was "the 'closest call' of the whole § 271 record," (2) "the record contains little evidence of [a] fully functional, flow-through eligible SATE," and (3) the SATE issue is the "significant 'loose end' remaining in this application." CPUC at 51-52. The Iowa Utilities Board acknowledges that "Qwest apparently could not achieve a SATE that mirrored production."[41]

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[38] *Id.* at 36.

[39] *Id.*; WorldCom at 21-23.

[40] *Texas 271 Order* ¶ 138.

[41] IUB at 14. *See also* NDPSC Consultative Report at 175 (stating, only that "[t]o the extent possible," SATE mirrors the production environment and is separate from the production environment). The Colorado PUC, contrary to the Commission's admonition that the prospect of future compliance is irrelevant to the issue of a BOC's current compliance with Section 271, found SATE adequate by including a performance measurement for SATE in Qwest's Performance Assurance Plan, and promised to include an additional "PID" in the PAP once it was developed. CPUC at 51. Even the CPUC, however, acknowledged that this solution "may fall short" of the Commission's criteria. *Id.* at 51-52. The Iowa Utilities Board, by contrast, found that the deficiencies with SATE noted by KPMG "go beyond" the Commission's criteria regarding test environments, and reasoned that Qwest's documentation adequately described the differences between SATE and the production environment. IUB at 10-15. As AT&T has previously shown, however, the reasoning of the IUB is both incorrect and inadequate. AT&T at 37-38.

Qwest's recent *ex parte* letters regarding SATE provide further confirmation that SATE fails to mirror the production environment.[42] One table presented in these *ex partes* shows that SATE includes only about 78 percent of all error messages actually experienced in production (409 of 525 error messages). Even assuming that Qwest's data are correct as stated, CLECs using SATE cannot receive 22 percent of the error messages that they would actually receive in production. Furthermore, Qwest's table shows that SATE covers only 13.43 percent of the total legacy system error messages that have been encountered in production.[43] Qwest's statement that "not every possible legacy error response is duplicated in SATE" is a gross understatement.[44]

The omission of so many errors, and error messages, from SATE is flatly inconsistent with Qwest's own description of the purpose of interface testing – "to ensure CLECs that their systems will be able to receive and display error messages and other responses, such as FOCs."[45] Because so many responses are *not* coded in SATE, CLECs have no assurance that the error messages that they receive in SATE will be the same as those received in production. In fact, the examples that Qwest offers of differences in SATE responses and production responses confirm that the content of the responses can be, and are, dramatically different: (1) when a CLEC reserves an appointment longer than 8 hours, a CLEC receives a response of "you cannot reserve an appointment longer than 8 hours" in production, but a response of "no appointment available" in SATE; (2) when a CLEC attempts to retrieve a customer service record using an incorrect

[42] *See* Qwest July 15 *ex parte*; Qwest July 19 *ex parte* at 7-10.

[43] *See* Qwest July 15 *ex parte* (table); Qwest July 19 *ex parte* at 8 and table attached thereto. Attachment 2 hereto, which is based on the table included in Qwest's *ex partes*, shows how the above-described percentages were calculated. The 22 percent figure represents the difference between the number of production legacy system errors not included in SATE (134 minus 18), divided by the combined total of 525 errors in the Business Process Layer ("BPL") and the legacy systems (391 plus 134). The 13 SATE-coded legacy system errors constitute 13.43 percent of the 134 legacy system errors.

[44] Qwest July 15 *ex parte*, "SATE Mirroring Production," at 1; Qwest July 19 *ex parte* at 7.

circuit ID number, it receives a response of "missing reference data in CRIS [because] circuit ID number not listed" in production, but a response of "no active account" in SATE; and (3) when a CLEC enters an incorrect zip code in a pre-order query, it receives a response of "no [geographic area] match for that zip code" production, but a response of "address not found" in SATE.[46] In all three of these examples, the SATE error message returned would also be returned for other encountered error conditions, and CLECs do not know which error condition has actually been encountered.

Qwest attempts to explain away these differences by asserting that the "structure," not the content, is important to CLECs, and that "what is important is whether the CLEC can receive and display the error message."[47] As Qwest knows, however, the content of the messages received in a test environment is extremely important to a CLEC. There is, for example, a significant difference between being advised that an appointment is totally unavailable, and being advised that an appointment cannot be reserved for more than 8 hours. Unless the content of the SATE message is the same as that of the message it receives in production, the CLEC has no assurance that the transaction it receives in SATE will have the same experience in commercial production – or how the CLEC should respond to Qwest's message or which actual error condition has occurred. Thus, whether a human being or the CLEC's EDI code actually acts upon the content of an error message (*see* Qwest July 19 *ex parte* at 7), the importance of the content of the message to a CLEC – and the confusion that the CLEC will experience due to the differences in the content of the messages – will be the same.[48]

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[45] July 15 *ex parte*, "SATE Mirroring Production," at 1.

[46] Qwest July 19 *ex parte* at 9; Qwest July 15 *ex parte*, "SATE Mirroring Production" at 3.

[47] Qwest July 15 *ex parte* at 3. *See also* Qwest July 19 *ex parte* at 7-8.

[48] As KPMG noted, the problems that CLECs experience as a result of the differences in the responses in SATE and those in production are not alleviated or removed because Qwest has issued documentation describing those differences. AT&T at 38. That documentation only enables CLECs to look up each response against the

Moreover, CLECs may desire to develop software of their own that analyzes the content of error codes and prompt for responses (either by its electronic systems or by CLEC representatives) error messages in actual production. As a practical matter, development of such software is impossible if the responses received in SATE differ from those in actual production. Similarly, because of the different content of SATE responses and production responses, CLECs evaluating a new version of an interface "have no way of knowing whether they will receive the same response in production and whether they should revise their systems, ask Qwest to revise its systems, or conclude that there is no need for any changes."[49] In short, the specificity and content of the message received in SATE, and the extent to which that content mirrors production, is critical to a CLEC's ability to compete.

Qwest's attempt to attach "significance" to the absence of any requests by CLECs for coding of specific additional error messages in SATE is disingenuous. July 15 *ex parte*, "SATE Mirroring Production" at 1-2. The lack of such requests is due to Qwest's insistence that any CLEC seeking the inclusion of additional error codes must file a data request form for those codes. Because of Qwest's refusal to make SATE mirror the production environment, and the fact that Qwest limits that resources available for improvements to SATE, CLECs could achieve the coding of additional error messages in SATE only by foregoing the implementation of the vast array of functionality, products, or features that are not (but should be) currently included in SATE.[50] During the Section 271 workshops conducted by the Arizona Corporation Commission, AT&T requested that Qwest code all production error messages in SATE as a matter of policy (rather than as a part of the change management process); Qwest refused to do so.

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documentation to determine whether the SATE response matches the response in production. CLECs should not be required to perform such a cumbersome, time-consuming task.

[49] WorldCom at 21; *see also* AT&T at 37-38.

[50] *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 101 n.69; WorldCom at 21-22.

B. Qwest's Interfaces Fail To Provide Nondiscriminatory Access.

The comments confirm that Qwest's interfaces do not provide CLECs with access to OSS functions that is equivalent to that which Qwest provides its retail operations.

Pre-Ordering. Qwest fails to provide nondiscriminatory access to pre-ordering in numerous respects. *First*, Qwest has not provided CLECs with the ability to integrate EDI pre-ordering and ordering functions successfully. For example, even though MCI has integrated its EDI interfaces based on Qwest's documentation, Qwest still rejects more than 30 percent of MCI's orders – showing that "the only 'integration' that is possible still results in a high reject rate on basic UNE-P orders."[51]

AT&T has also encountered substantial integration difficulties.[52] Verizon and BellSouth have designed their parsed CSR so that the information in the service and equipment ("S&E") section of the CSR is based on the end-user's telephone number ("TN"). Thus, in the S&E section of these RBOCs' parsed CSRs, the telephone number is followed by the line-based features associated with the TN, including the primary interexchange carrier ("PIC") code, the local PIC ("LPIC") code, the line class code, and features. The CLEC's systems thus "know" what information follows the TN, and where the information is (since the number of digits for each entry are defined in the RBOC's parsing rules). This design enables the CLEC to locate the data and populate the local service request ("LSR"), since the LSR is also TN-oriented.

By contrast, although Qwest maintains the TN orientation for LSRs, Qwest has grouped information in the S&E section of the CSR based on the universal service ordering codes ("USOCs") for the various products and services ordered by the customer. Each USOC on Qwest's parsed CSR is followed by a string of data, but the data do not necessarily contain the

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[51] WorldCom at 8.

[52] *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 124 & n.83.

telephone number associated with the USOC. CLECs using Qwest's parsed CSR must parse the data in the S&E section to determine the applicable TN as well as the line-based features associated with that particular TN. Thus, for example, a CLEC would be required first to locate all USOCs and then the TN field identifier ("FID") and then search separately for the 7-digit (or 10-digit) number that is the customer's TN, the four-digit number that constitutes the PIC associated with that TN, the digits for the intraLATA carrier PIC, the digits for the line class code, and each line-based feature. Because customers commonly order more than one feature, the parsed CSR typically contains several strings of data (one for each USOC), with each USOC containing a separate telephone reference. As a result, the time and resources that the CLEC would be required to devote to searching for the correct TN and line-based features outweigh any benefits that might be obtained from using the parsed CSR – particularly where, as in AT&T's case, the CLEC intends to offer local exchange service on a mass-market basis.

Because Qwest's illogical and cumbersome orientation of its parsed CSR precludes CLECs from using computer-based engineering to efficiently auto-populate the S&E data in to the LSR, and because Qwest has not provided adequate parsing business rules, AT&T displays pages of the data in the S&E section and provides for them to be manually populated it into the LSR. In short, Qwest's failure to use the telephone number as the reference point for the S&E section of the CSR precludes CLECs from successfully, and fully, integrating pre-ordering and ordering functions.

The inability of CLECs to integrate pre-ordering and ordering functions successfully is further confirmed by Qwest's failure in this Application to cite a single real-world CLEC that has actually done so. Based on the materials in Qwest's separate (and subsequent) 271 application for Washington and three other states, it appears likely that Qwest will cite a recent letter from New Access as evidence of actual successful integration by a CLEC.[53] The undated, three-sentence letter from New Access, however, provides no support for Qwest's claim. The letter does not describe who developed the alleged integration capability used by New Access, when New Access began to auto-populate LSRs, and the extent to which New Access auto-populates LSRs. Moreover, the claim of New Access that it uses EDI pre-ordering data to populate EDI order translations is inconsistent with Qwest's recent *ex parte* regarding the CLECs' use of its test environment, which states that ***

*** [54]

In addition to its failure to enable CLECs to integrate pre-ordering and ordering functions successfully, Qwest has failed to meet its obligation to enable CLECs to integrate pre-ordering interfaces successfully with their own back-office systems.[55] As AT&T described, CLECs using the EDI pre-ordering interface experience order rejections because the service address information in the "CRIS" database that supplies the service address information used by CLECs on migration orders frequently do not match the information in the PREMIS database used by Qwest to validate addresses. This impediment to integration appears to be unique to Qwest's

[53] *See* Notarianni/Doherty Declaration in *Qwest II*, Exh. LN-OSS-15. Consideration of the New Access letter by the Commission in the instant proceeding would be improper. Although the letter has a fax date of June 19, 2002 (six days after Qwest filed its application), the letter itself contains no date, and Qwest did not suggest in *Qwest II* that it discovered the purported "integration" by New Access only after it filed its first application. Qwest did not advise CLECs of the New Access letter until late June, when it filed comments in the Section 271 proceedings in Arizona. Because of the eleventh-hour nature of the disclosure of the letter, CLECs have had no opportunity to conduct discovery of Qwest or New Access regarding the assertions made in the letter.

[54] *See* Qwest July 15 *ex parte* on test environment, at 4. The Commission has never previously found a letter from a single CLEC, written in highly conclusory terms, to be a sufficient basis for concluding that CLECs "have been able to successfully integrate both pre-ordering and ordering." *See, e.g., Georgia/Louisiana 271 Order* ¶ 123 (finding that four CLECs had stated that they were able to integrate successfully); *Texas 271 Order* ¶¶ 154-155 & n.417 (finding that as many as three CLECs had integrated successfully, one of which had been submitting orders for at least ten months).

[55] The Commission has stated that "in order to demonstrate compliance with checklist item 2, the BOC must enable competing carriers to transfer pre-ordering information (such as a customer's address or existing features) electronically into the carrier's own back office systems and back into the BOC's ordering interface." *Texas 271 Order* ¶ 152. *See also Georgia/Louisiana 271 Order* ¶ 119.

systems.[56] Because of the extent of order rejections resulting from these "mismatches," AT&T has found it necessary to obtain address information for migration orders by using the address validation based on telephone number ("TNAVQ") function of Qwest's GUI interface, where the address is validated using the PREMIS database.[57] However, the use of the GUI (which is not integratable with a CLEC's back-office systems) requires AT&T to enter the order twice – once into the LSR and once into AT&T's own systems – in order for AT&T to store the data in its own systems. This "double data entry" is a denial of parity, because it increases the likelihood that the CLECs will experience additional costs, delays, and human errors not experienced by Qwest's retail operations, which use fully integrated systems.[58]

Second, Qwest has not shown that it provides CLECs with nondiscriminatory access to the same loop qualification information that is available to Qwest itself.[59] The "loop qualification tools" that Qwest provides to CLECs suffer from "numerous and severe deficiencies."[60] Information derived from these "tools" is often inaccurate or incomplete – indicating that, in violation of this Commission's requirements, Qwest is "filtering" data from the databases to which it has access.[61] Qwest itself has admitted that, because "the Qwest Loop Qualification Tool uses a proprietary algorithm and [the] Raw Loop Data tool does not," the Raw

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[56] AT&T at 40. The rejections caused by such "mismatches" do not occur in the regions served by Verizon (which has ensured that the address information in its databases are identical) and by SWBT (which has programmed its systems to process an order as long as the address information derived from the CSR is a "near-match" to the information in its database that validates address information on the LSR).

[57] AT&T cannot currently use the address validation function of the EDI pre-ordering interface, because its own systems were designed to obtain and use CSRs as the source of service address information on migration orders.

[58] *See, e.g., Second Louisiana 271 Order* ¶ 96.

[59] *See* AT&T at 38; Covad at 13-25; WorldCom at 24-25.

[60] Covad at 19-20.

[61] Covad at 19-21; WorldCom at 24-25 (describing MCI's receipt of responses which state that fiber exists in a particular loop, but fail to advise that spare facilities are available, notwithstanding Qwest's claim that its database contains information concerning spare copper facilities).

Loop Data tool might erroneously advise the CLEC that a particular loop could serve customers using the DSL offered by the CLEC. Qwest June 10 *ex parte* at 24-25 (Tab 9).[62]

Third, Qwest has not provided CLECs with the ability to perform (or have performed) mechanized loop testing ("MLT") before actual provisioning.[63] Qwest's refusal to do so severely impairs CLEC's opportunity to compete, because an MLT is necessary in order to verify the accuracy of the loop qualification information that Qwest provides.[64] Qwest's policy is a denial of parity, since Qwest has performed pre-order MLTs in its retail operations.[65]

Finally, the comments show that Qwest denies nondiscriminatory access to pre-ordering functions because it changes due dates for CLEC orders far more frequently than for its own retail orders. The higher rate of postponed installations results in customer dissatisfaction (blamed on the CLEC) and requires the CLECs to expend additional resources to determine the actual delivery date and to "mend damaged customer relationships."[66]

[62] In addition to denying CLECs access to all of its systems with loop qualification information, Qwest has not offered to conduct a manual search of engineering records for CLECs – until very recently. *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 129. Although the Colorado PUC states that it has ordered the inclusion of a provision requiring such searches in Qwest's SGAT (CPUC at 19), the new provisions of the Colorado SGAT are not nearly as extensive as the provisions that Qwest has incorporated in the SGATs of the four States that are the subject of its *Qwest II* application. *Compare* Colorado SGAT § 9.2.2.8.1 *with* Notarianni/Doherty *Qwest II* Decl. ¶ 116 n.131 (quoting SGAT § 9.2.2.8.6 in the four *Qwest II* States, which – unlike the Colorado SGAT – requires Qwest to perform manual search upon CLEC request and specifies particular loop make-up information that Qwest must provide in response to such a request). The SGATs in the other four *Qwest I* States do not even provide CLECs with the protection afforded by Colorado, but instead give Qwest almost total discretion to determine what access CLECs will have to loop qualification information. *See* NDPSC Consultative Report at 132. Finally, unlike the *Qwest II* States, none of the *Qwest I* States, including Colorado, gives CLECs the right to audit Qwest's loop qualification information to ensure that they are receiving parity of access. Covad at 16.

[63] *See* AT&T at 38-39 & Finnegan/Connolly/Menezes Decl. ¶¶ 130-135; Covad at 22-24.

[64] AT&T at 38-39; Covad at 22-24.

[65] *See* Qwest July 10 *ex parte* at 26-27 (Tab 10); AT&T Finnegan/Connolly/Menezes Decl. ¶ 133; Covad at 19. Contrary to the assertions of the North Dakota PSC, Qwest did not make available all of the data from its retail pre-order MLTs to CLECs. *See* NDPSC Consultative report at 131; Covad at 19 (Qwest only populated the Raw Loop Data tool with MLT information about loop lengths, not with other data from the MLT). Furthermore, the NDPSC's assertion that a pre-order MLT would "disrupt service" is contradicted not only by Qwest's own performance of such MLTs, but by the evidence that MLTs are relatively simple and easy to perform – as reflected by Verizon's willingness to perform them for CLECs. *See* North Dakota PSC Consultative Report at 131; Covad at 23-25; AT&T Finnegan/Connolly/Menezes Decl. ¶ 135 n.94.

[66] AT&T at 40; Covad at 28-29. *See also* DOJ Eval. at 20 (noting that "due date changes on wholesale orders have exceeded the number of due date changes on retail orders," which suggests that "further analysis is warranted").

Ordering and Provisioning. The comments also confirm that Qwest fails to provide nondiscriminatory access to ordering and provisioning functions. First, Qwest's systems are plagued by high-rates of order rejections, manual processing of electronically submitted CLEC orders, and manual errors.[67] Qwest's systems, for example, reject approximately one-third of orders submitted by CLECs using the electronic Qwest interfaces – a rate that DOJ correctly describes as "high."[68] Qwest cannot simply attribute these rates to "CLEC errors." As DOJ points out, Qwest increases the likelihood of order rejections because (unlike other RBOCs) it does not offer migration by telephone number and requires CLECs to specify the features to remove, as well as those to place, on a "migration as specified" order.[69] The likelihood of rejections is further increased by the above-described failure of Qwest to enable CLECs to integrate pre-ordering and ordering functions successfully and to ensure that the address information in the CRIS and PREMIS are the same.

Qwest's total flow-through rates are also too low, and its manual processing rates too high, to give CLECs a meaningful opportunity to compete.[70] As DOJ states, "[c]learly, a large quantity of electronically submitted orders are being handled manually by Qwest." In April, the percentage of orders manually processed by Qwest ranged from 39.6 percent to 73.1 percent in the joint application states.[71] The manual processing of orders increases the likelihood of delays and errors in provisioning – a risk that is not experienced by Qwest's retail operations, which use highly automated systems.[72]

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[67] AT&T at 40-41; Covad at 39-42; Eschelon at 6; WorldCom at 10-12.

[68] AT&T at 14; DOJ Eval. at 14.

[69] *See* DOJ Eval. at 15-16; WorldCom at 9-10.

[70] AT&T at 41; Eschelon at 6; WorldCom at 10-12.

[71] DOJ Eval. at 17; AT&T at 41.

[72] AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 145-146.

Furthermore, KPMG's third-party testing established that Qwest commits numerous errors in manually processing orders. As the Idaho PUC states: "The testing revealed *an unacceptably high level of human errors* in the manual processing of orders. Although Qwest implemented additional training and revised documentation to address this problem, *the problems persisted in the limited retesting conducted after the fixes were implemented.*"[73] Just two months ago KPMG continued to find errors on approximately 15 percent of the orders that it reviewed.[74] The Nebraska PSC has cited KPMG's findings of human error as a "caveat" to its recommendation of approval of Qwest's application, because "very little hard evidence exists to validate *whether this problem has truly been corrected,*" notwithstanding Qwest's claim that is has conducted additional training of its personnel.[75]

KPMG's findings should be dispositive here, because Qwest had not reported data on service order accuracy in its regular performance reports at the time of its application. Only recently did Qwest agree to report such data (and only after a recommendation by KPMG that it do so). As the DOJ states, the lack of regularly reported commercial data on the accuracy of

[73] IPUC at 6-7 (emphasis added).

[74] AT&T at 41-42; Covad at 40; WorldCom at 12; DOJ Eval. at 21. In view of the agreement of the commenters regarding KPMG's finding, Qwest's attempt to dispute that KPMG found an error rate of 15 percent is illogical. Qwest July 10 *ex parte* at 14 (Tab 5). Moreover, Qwest's argument that the 15 percent figure is "based on a very small number of orders" is disingenuous. *Id.* As the DOJ states, KPMG recommended additional retesting to focus on the accuracy of manually processed orders, but "Qwest elected not to support a retest, so the Observation [3110] was designated 'closed/unresolved.'" DOJ Eval. at 21. Qwest's insistence on ending the KPMG test on May 28, 2002, without further retesting of such competitively critical areas of the OSS as manual errors, change management, and the test environment occurred at about the same time the issue of the effect of Qwest's secret agreements on the validity of the results of the KPMG agreements on the validity of the results of the KPMG test (including areas where KPMG found that Qwest had satisfied test criteria).

[75] *See* Application No. C-1830, *In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c)*, Nebraska PSC Order Approving Qwest's 271 Application and Recommending Approval to the Federal Communications Commission, entered June 12, 2002, at 4 (¶ 12) (emphasis added). *See also* NPSC CMP Order at 3 (¶ 9); NPSC Comments at 7, 9.

Qwest's manual order processing "renders the record incomplete" and raises "a serious issue, particularly given the expert tester's carefully expressed concerns."[76]

In a series of *ex parte* letters since the filing of its Application, Qwest has set forth various "internal data" and arguments in an attempt to show that its error rate in manually processing CLEC orders is low. However, Qwest's data on "application date accuracy," "LSR/order mismatches," and "manually processed LSRs rejected in error" are plainly self-serving and unreliable. For example, Qwest's data on "application date accuracy" provide no meaningful indication of the overall accuracy of its manual processing.[77] Although application dates are certainly important to CLECs, the accuracy rates reported by Qwest are undoubtedly vastly overstated, because they omit any errors committed by Qwest on *other* fields of a service order, including codes (such as USOCs) that CLECs use on virtually every LSR.[78]

The "LSR/Order mismatch" rates submitted by Qwest are equally unreliable. The rates are based only on orders for a period of five calendar days – which began on the day after Qwest implemented its process for "tracking" such mismatches.[79] The "mismatch rates" reported by Qwest are also understated, because Qwest has improperly included *all* completed orders (even electronically processed orders that were not manually processed) in the denominator of its

[76] DOJ Eval. at 19, 21. *See also* AT&T Finnegan/Connolly/Menezes Decl. ¶ 161 (quoting portion of KPMG's Final Report expressing concern about the "numerous problems" that KPMG encountered during the test regarding the accuracy of manually processed orders).

[77] *See, e.g.,* Qwest July 19 *ex parte* at 16; Qwest July 18 *ex parte* at 1; Qwest July 12 *ex parte* at 1; Qwest July 10 *ex parte* at 16 (Tab 5). As Qwest's *ex partes* effectively admit, the data that Qwest originally described in its Application as "service order accuracy" rates were both inaccurate and misleading, because Qwest did not specify that the data were based only on application dates and were not limited to manually processed orders. *See* Qwest July 12 *ex parte.*

[78] *See* AT&T at 42 n.108 & Finnegan/Connolly/Menezes Decl. ¶¶ 172-173; DOJ Eval. at 22 n.97 ("Qwest's audit was limited to verifying the accuracy of the 'APP' (date) field"). Qwest itself acknowledges that the application date is only "one of several fields" that it will evaluate under the new PID (PO-20) for service order accuracy. Qwest July 19 *ex parte* at 40.

[79] *See* Qwest July 10 *ex parte* at 13 (Tab 4); DOJ Eval. at 22 n.97.

calculation.[80] And, given the time frame of its orders, Qwest cannot possibly have included in its study "all orders qualified for measurement OP-5" as it claims, since that measurement encompasses new installations that are free of trouble reports within 30 days of initial installation.[81]

Although Qwest asserts that less than 1 percent of manually processed LSRs are rejected in error, its figure represents the percentage of manual LSRs that eventually receive a firm order confirmation ("FOC") after initially being issued a rejection notice.[82] This methodology, however, includes even those orders that Qwest *properly* rejected. Under Qwest's business rules, if Qwest returns a rejection notice on a LSR for a "fatal error," and the CLEC resubmits the original LSR with the appropriate corrections (and the LSR is otherwise complete and accurate), Qwest will send a FOC to the CLEC. Because CLECs commonly receive a FOC after resubmitting an LSR in response to a rejection notice, Qwest's percentage of manual LSRs "FOC'd after reject" reveals nothing about the extent to which the rejections were erroneous.[83]

Finally, Qwest's attempts to cite the results of data reconciliation efforts by Liberty, and the results of the KPMG testing, as evidence that it has no significant manual error problems is

[80] Qwest July 10 *ex parte* at 13 (Tab 4).

[81] Qwest July 10 *ex parte* at 13 (Tab 4). Qwest contends that it analyzed "all orders from June 28 through July 3 to determine the volume of the LSR/order mismatch situations as a percentage of all orders qualified for measurement by OP-5." *Id.* In order to ensure that "all orders qualified for measurement by OP-5" were included in its analysis, however, Qwest would be required to wait until August 2 (30 days after the orders completed on July 3, which was the last day of the time period used by Qwest). Because Qwest filed its data in its *ex parte* letter of July 10 – more than three weeks prior to August 2 – its analysis could not have encompassed the universe that it describes. CLECs and their customers may not discover problems that resulted in "mismatches" (such as the failure to provision features ordered by the customer) until well after the seven-to-twelve day period that elapsed between the June 28-July 3 period used by Qwest in its analysis and the July 10 *ex parte*. For example, a customer may not attempt to use features that it ordered (such as three-way calling), or discover that the feature had not been installed, until several weeks – or even more than 30 days – after the scheduled installation date. Such a situation would not have been captured in Qwest's study (or, in some instances, in the OP-5 metric itself).

[82] *See* July 10 *ex parte* at 16-17 (Tab 5).

[83] Indeed, since Qwest's own business rules contemplate the transmission of a FOC after resubmission of an adequate LSR sent in response to a rejection notice, Qwest's calculation that less than 1 percent of LSRs receive a FOC after a rejection notice is inherently suspect.

misplaced.[84] Liberty opened a number of observations because it found Qwest's rate of human errors unacceptable, but closed them without reviewing any orders to verify whether Qwest had fixed the problems.[85] By contrast, KPMG's recent analysis of manual errors by Qwest (reflected in KPMG's Observation 3110) involved an actual review of Qwest orders generated after Qwest purportedly implemented "fixes" to correct the problems noted by Liberty.[86]

Second, like the KPMG test and Qwest's own reported performance data, the comments confirm that Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete. The comments show, for example, that Qwest does not return jeopardy notices in a timely fashion, transmits jeopardy notices after Qwest initially issued a FOC but later discovered that the order was in error, and issues completion notices before provisioning has actually been completed.[87] These deficiencies put CLECs at a severe competitive disadvantage with Qwest's retail operations, which have real-time, fully automated access to order status information.

Billing. The comments demonstrate that Qwest has not met its obligation to provide "complete, accurate, and timely" daily usage files ("DUFs") and wholesale bills to CLECs.[88] In addition to the numerous billing errors that AT&T described in its opening comments, Eschelon

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[84] *See* Qwest July 10 *ex parte* at 14-15, 17.

[85] AT&T at 47 & Finnegan Decl. ¶¶ 38-71.

[86] KPMG's findings in its test regarding provisioning accuracy lend no support to Qwest's claim that it manually processes orders accurately. KPMG's discussion of the provisioning accuracy tests does not indicate the extent to which manually processed orders (as opposed to orders that flowed through) were considered in that test. Qwest's interpretation of the KPMG test is totally inconsistent not only with the concerns that KPMG expressed in the Final Report regarding the extent of human errors committed by Qwest, but also by KPMG's finding that it was unable to determine whether Qwest defined, documented, and followed its procedures for manually processing orders that did not flow through. *See* KPMG Final Report at 149-150 (Evaluation Criterion 12.8-2). In any event, the fact that Qwest eventually passed KPMG's provisioning accuracy test – after both KPMG and Hewlett-Packard had previously found numerous provisioning errors – does not show that it can consistently provision orders accurately in the commercial environment. WorldCom Lichtenberg Decl. ¶ 42. To the contrary, the comments state that on some types of orders (such as UNE/UNE-Star), Qwest's provisioning error rate has been at least 50 percent. Eschelon at 11 & Powers Decl. ¶ 13.

[87] *See* AT&T at 43; Covad at 25-28; WorldCom at 12-15.

states that it has more than $2.2 million in outstanding disputes with Quest as a result of inaccurate charges on its bills, that *all* of its bills for UNE-Eschelon/UNE-Star (which represents approximately 60 percent of Eschelon's total bill amounts) have been inaccurate, and that its DUFs do not include minutes of use for intraLATA toll traffic carried by Qwest.[89] WorldCom likewise states that it has "opened billing disputes with Qwest for hundreds of thousands of dollars."[90] The inaccuracy of Qwest's wholesale bills and DUFs is further confirmed by KPMG's third-party testing, where Qwest repeatedly transmitted erroneous wholesale bills and failed KPMG's test for DUF accuracy and completeness five separate times before it finally (and barely) passed on the sixth try.[91]

The errors in Qwest's wholesale bills described in the comments undoubtedly understate the full extent of Qwest's failure to provide accurate bills, because they are based on a limited review of the cumbersome, voluminous *paper* bills which Qwest provides to CLECs.[92] Qwest does not provide CLECs with the fully auditable bill which this Commission has required as a condition of Section 271 approval, and which the DOJ has described as an "important factor in making local telecommunications markets fully open to competition."[93] The DOJ expresses particular concern regarding the auditability of Qwest's electronic bills, finding that "Qwest's

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[88] *See, e.g., New Jersey 271 Order* ¶ 121; AT&T at 44-46; Eschelon at 22-24; WorldCom at 17-19.

[89] Eschelon at 22-26.

[90] WorldCom at 18.

[91] *See* AT&T at 45-46; WorldCom at 18. In an apparent response to the evidence of its repeated failures of the DUF test during KPMG's testing, Qwest recently asserted that the first two tests were cancelled due to test bed problems, and that it passed the DUF test administered by Cap Gemini as part of the OSS test in Arizona. Qwest July 10 *ex parte* at 8-9 (Tab 3). These arguments are illogical. KPMG's Final Report clearly considered the first two tests to be valid tests. *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 219 n.154 (quoting KPMG Final Report). Even if Qwest failed the KPMG test "only" three times before it ultimately passed, that record of failures still calls the reliability of its systems into serious question. *See* AT&T at 45. That is equally true with respect to the Cap Gemini test, which Qwest passed only after two retests (each of which was smaller in scope that Cap Gemini's first test). *See* Qwest July 10 *ex parte*, Tab 3, Att. 3-A at 8-9, 11 (Cap Gemini report).

[92] *See, e.g.,* WorldCom at 18.

[93] *New Jersey 271 Order* ¶ 124; *Pennsylvania 271 Order* ¶ 22; DOJ Eval. at 23 & n.102; AT&T at 19-20; WorldCom at 17-18.

application as filed does not demonstrate that it provides CLECs with electronically auditable wholesale bills for the UNE platform," and that "[I]t is unclear whether Qwest's billing system, absent reliance on BOS-BDT, satisfies the requirement of electronic auditability."[94]

Qwest's wholesale electronic bills are not auditable because they are not provided using the industry standard CABS BOS BDT format, which would permit CLECs to use computer software to audit the data. Instead, Qwest generates electronic bills using its non-industry-standard "CRIS" system in its own proprietary format, which precludes the bills from being audited with the use of currently available software.[95]

Qwest previously promised that it would implement electronic CABS BOS billing for wholesale charges on July 1, 2002.[96] That did not happen. Although the bills are now in BOS BDT format, they are still generated by Qwest's CRIS system – not by CABS. Qwest's use of CRIS precludes CLECs from designing a single system to handle and audit the CRIS bills, since Qwest's three billing centers provide CRIS bills with differing levels of detail.[97] Moreover, Qwest has advised CLECs that the new CRIS bills will not be subject to CABS BOS edits, which ensure that all fields on the bill are populated correctly.[98]

Even in the short time since its implementation, the CRIS BOS BDT bill has already proven to be flawed. When AT&T received its first three such bills during the week of July 15, AT&T was unable to load or process them, because Qwest used suffix codes that were inconsistent with industry standards for BOS electronic bills.[99] Qwest then admitted that it had

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[94] DOJ Eval. at 2, 23.

[95] *See* AT&T at 19-20; WorldCom at 17-18.

[96] AT&T at 46 n. 132; WorldCom at 17.

[97] WorldCom at 18 & Lichtenberg Decl. 68.

[98] *See* Memorandum to Bill Difference Distribution Group from Catriona Dowling (Qwest), dated July 11, 2002 (attached hereto as Attachment 3). The lack of such edits increases the likelihood that the bill will be inaccurate.

[99] BOS electronic bills are required to be formatted consistently with the Telcordia industry standards. Under those standards, the bill must begin with a 100101 (header record) and end with a 109999 (trailer record) with accurate

erred and resubmitted the three bills (for Washington, Arizona, and Colorado) with the correct codes during the week of July 22.

Even the three bills resubmitted by Qwest were seriously defective. Each resubmitted bill was out of balance (*i.e.*, the total amount listed as due on the bill was inconsistent with the sum of the individualized charges), lacked some usage records, and provided detail records for taxes that were incorrectly coded. The bills also contained misformatted details for "other charges and credits," and for adjustments, with invalid "date from" and "date through" entries. Moreover, because the three bills were not provided by the same billing center, the problems in the Washington bill (which was issued by the billing center in Qwest's Western region) were somewhat different from those in the bills for Arizona and Colorado (which were issued by the billing center for Qwest's central region).[100] This new problem has been referred to Qwest's technical group. Even if these problems are resolved, however, experience to date with the new CRIS BOS bill illustrates that it will take some time before all deficiencies in the bill have been determined and fixed.[101]

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suffix indicators in each that specify the content of subsequent billing records. The accurate population of the "record identification suffix" and "suffix record indicator" data elements on all records is very important. Qwest did not populate the suffix record indicator correctly on the last 109999 record to indicate that it was the last record fo the bill. AT&T has programmed its systems according to industry standards, and was unable to process the bill because it appeared to be incomplete.

[100] Although the usage amounts and tax amounts in all three bills were out of balance, the amounts in the Washington bill (but not the Arizona and Colorado bills) for other charges and credits were also out of balance. AT&T has not received a CRIS BOS BDT bill from the billing center in Qwest's Eastern region since July 1.

[101] *Cf.* DOJ Eval. at 23 n.106 (noting that Verizon's BOS BDT bill "encountered numerous problems with its initial deployment"). *See also Pennsylvania 271 Order* ¶ 19 (noting that nine months after Verizon first introduced its BOS BDT bill, and even after Verizon suspended such billing for four months to allow for system corrections, Verizon and the CLECs still identified "a number of problems that required correction"). As the DOJ notes, no independent testing of Qwest's CRIS BOS BDT bill was conducted prior to its implementation. DOJ Eval. at 23 n.106. Although AT&T conducted testing of the bill with Qwest during the month prior to implementation, Qwest limited the testing to a single bill file consisting of 14 usage records and 38 recurring charge records. The bill contained no records for other charges and credits, adjustments, or taxes. Because it desired more thorough testing, AT&T requested that Qwest provide a BOS BDT version of a previously issued paper bill prior to the scheduled July 1 implementation date. Qwest, however, refused to do so.

In its recent *ex parte* submissions, Qwest has asserted that its electronic CRIS bills are auditable, because they "can be loaded into publicly available software," including spreadsheet programs, "to mechanize their validation steps."[102] That is incorrect. A CLEC would be required to program the spreadsheet or database application in order to validate the correct columns and rows of the bill against the controls that it has in its own systems. Using programs such as Microsoft Excel or Lotus 1-2-3, as Qwest suggests, is unrealistic. Due to limitations on file sizes that are imposed by spreadsheet software, CLECs serving large volumes of customers would likely be unable to load their bills into such software – and, if they attempted to do so, their systems would probably "crash," with the possible loss of data. Even such programs as Microsoft Access would not be sufficient to enable a CLEC to audit a CRIS bill, because the CLEC could audit the bill only if it developed its own software to do so – a time-consuming and expensive task.[103] Although Qwest has suggested that CLECs can load the ASCII format or EDI bill in other "database programs" or "database applications" (*e.g.*, Qwest July 10 *ex parte* at 3), the fact that Qwest has not specifically identified such programs or applications (even after years of state Section 271 proceedings) confirms the lack of merit in its claim of verifiability.[104]

Even if currently-available commercial software could be used to verify the accuracy of CRIS bills (and it cannot to the best of AT&T's knowledge), Qwest's CRIS bills lack sufficient detail to permit such a verification. For example, although Qwest argues that CLECs can

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[102] Qwest June 10 *ex parte* at 3.

[103] Qwest's assertion that its CRIS bills conform to the industry standards established by Telcordia is misleading. Qwest June 10 *ex parte* at 3-4. Only Qwest's *paper* CRIS bills conform to the Telcordia standards; its *electronic* CRIS bills do not. Because of their sheer bulk, the paper bills are inauditable regardless of whether they comply with industry standards.

[104] Similarly, only in recently-filed *ex partes* did Qwest identify particular companies that provide services or offer software systems that purportedly can be used to audit CRIS bills (in EDI or ASCII Format). *See ex parte* letter from Yaron Dori (Qwest) to Marlene H. Dortch, dated July 25, 2002. The eleventh-hour nature of Qwest's identification is, by itself, reason for rejecting the credibility of its claim. Furthermore, although AT&T has had only a limited opportunity to investigate the companies identified by Qwest, the web sites of the identified

determine (through the "Summary of Service" section of the CRIS bill) whether their USOC quantities are correct, the bills do not contain summarized costs from which a CLEC could calculate the unit price for the recurring charges on the bill. As a result, the CLEC cannot determine whether the price being charged for each USOC is proper and consistent with its interconnection agreement with Qwest, or ascertain the time period for which the USOCs are being charged.[105] Moreover, the CRIS bills provide no details about the end-user's local calls, thereby preventing CLECs from verifying whether the billing amounts for end-user calls are consistent with the call details provided in the DUF.[106]

Finally, contrary to Qwest's assertion, the KPMG test does not support its claim that its bills are auditable. In the Colorado hearing from which Qwest selectively quotes KPMG's testimony, KPMG testified that it did *not* evaluate the auditability of Qwest's wholesale bills.[107]

C. The Performance Data Upon Which Qwest Relies Are Unreliable and Fail to Prove Section 271 Compliance.

The comments confirm that Qwest's performance data are inaccurate and unreliable and cannot reasonably be considered a reflection of Qwest's actual performance, and

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companies indicate that CLECs would be required to reformat the bills into spreadsheets or other form in order to audit them (in contrast to CABS bills, which require no such reformatting).

[105] *See* Qwest June 10 *ex parte* at 2-3; AT&T Finnegan/Connolly/Menezes Decl. ¶ 235. *See also* WorldCom at 17-18 & Lichtenberg ¶ 69 (describing failure of CRIS to include details that CLECs need to audit bill, including details on USOCs, service addresses, and adjustments).

[106] AT&T Finnegan/Connolly/Menezes Decl. ¶ 235.

[107] *See* Application at Attachment 5, Appendix K, Testimony of Michael W. Weeks, Colorado PUC proceeding, Docket No. 02M-260T, June 10, 2002, at 168-169 ("Q: As we discussed last week, KPMG did not evaluate, as a part of this test, the auditability of wholesale bills? A: No. We validated the accuracy of wholesale bills delivered to the pseudo-CLEC. We did not design a test that would have developed a conclusion that says bills are auditable or not by a CLEC. . . . We didn't have test criteria targeted at measuring auditability. . . . There's no evaluation criteria for – no conclusions about auditability in the report"). Similarly, in the vendors' conference cited by Qwest, KPMG acknowledged that a CLEC could not "take a record of a call as [KPMG] did, find a DUF and then find that call detail record on the UNE-P bill." Qwest July 10 *ex parte*, Tab 1, Att. 11 at 82. During its test, KPMG used a controlled testing process that ensured that all calls made by the end-users of its pseudo-CLEC were precisely recorded so that each such call could be verified. Unlike KPMG, however, a CLEC does not have the ability to control the number, types, durations, or frequency of calls made by or to its end-users. Only if the CLEC had such an ability could it audit the type of review suggested in the KPMG testimony cited by Qwest. *Id.*, Att. 11 at 81-82.

that even Qwest's inadequate data show that Qwest is not satisfying its statutory obligations.[108] The State commissions simply ignore this evidence or rely on Qwest's promises to take remedial steps and speculation that the performance enforcement plans will somehow compel Qwest to improve its performance. That is plainly impermissible.[109] Moreover, the inherent unreliability of Qwest's performance data, coupled with the structural defects in the performance remedy plans, preclude them from serving their intended purpose.[110]

1. The Audits and Reconciliation Do Not Prove Qwest's Data Are Accurate.

Qwest cannot reasonably rely on the Liberty Performance Measurement Audit, the Liberty data reconciliation process, the KPMG data reconciliation process, or the Cap Gemini Ernst & Young ("CGE&Y") Performance Measurement Audit as proof that its performance data are accurate. The Liberty and CGE&Y performance measurement audits were not designed to and did not test the accuracy of Qwest's raw data inputs.[111] As a consequence, those audits cannot rationally be characterized as proof of the accuracy of Qwest's performance data.

Moreover, the study objective of the Liberty data reconciliation was fundamentally flawed, and the study itself was extremely limited as to temporal, geographical, product and measurement scope.[112] Remarkably, even the flawed Liberty data reconciliation process

[108] Covad at 4, 31-34, 36-45; WorldCom at 9-11; 16-17; Eschelon at 3-4; Finnegan Decl. ¶¶17-203; Touch America at 9.

[109] *New York 271 Order* ¶37.

[110] *See, e.g.,* IPUC at 6 (conceding that KPMG's OSS testing uncovered excessive rates of human error in the manual processing of orders, but noting that these issues will be addressed through "additional reporting and monitoring" and the six month review of the performance assurance plan); CPUC at 38-39 (conceding that Qwest OSS received an "unable to determine" rating with respect to certain test criteria raising issues of human errors, but noting that "Qwest will have incentives to reduce any human error problems" since it has agreed to develop a measure on service order accuracy), *id.* at 44-45 (noting that even where the OSS test revealed that Qwest failed the performance standard, the "COPUC is convinced that the deviation is either trivial for competitive purposes, or more importantly, can be addressed on a going forward basis by enforcement through the CPAP").

[111] Finnegan Decl. ¶¶18-26, 99-105.

[112] Finnegan Decl. ¶¶27-35.

revealed substantial problems regarding the integrity of Qwest's data,[113] and Liberty closed observations without verifying that Qwest's proposed fixes actually eliminated the errors that Liberty uncovered in Qwest's data. Liberty reviewed Qwest's training materials, but "never confirmed whether the training took place or if it was efficacious."[114] Similarly, in a number of instances, Liberty closed observations before verifying that code fixes or other corrective measures successfully eliminated other errors in Qwest's performance reporting processes.[115]

Undaunted by the evidence, the Iowa, Colorado, North Dakota and Nebraska state regulatory commissions accept at face value Liberty's ultimate finding that Qwest's data are accurate.[116] The Idaho PUC, on the other hand, admits that the Liberty data reconciliation process (as well as the KPMG test) uncovered deficiencies in Qwest's performance data. Conceding that the Liberty data reconciliation process revealed discrepancies in the close out codes used by Qwest technicians in determining the source of a particular trouble, the Idaho PUC states that this issue "is of particular concern as it may have a significant impact on the inclusion of individual repair records in Qwest's performance reports, and the exclusion of just a few records could have a significant impact on payments made to CLECs under the QPAP." Idaho PUC at 10. The Idaho PUC also admits that, because of these errors, "Qwest's real performance in repairing CLEC" facilities could be masked. *Id.* And the Idaho PUC recognizes that KPMG's test also "revealed inconsistencies in the orders entered in repair reports by Qwest technicians or other personnel," and that these types of "errors may result in improper treatment of individual repair records in Qwest's performance reports." Idaho PUC at 10. As the Idaho PUC explains:

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[113] Finnegan Decl. ¶¶38-77; Covad at 45.

[114] Covad at 45. *See also* Finnegan Decl. ¶¶40-41.

[115] Covad at 44-45. *See also* Finnegan Decl. ¶¶38-77.

[116] IUB at 17 (noting that "the IUB accepted the reports filed by Liberty as adequate without requiring a separate data reconciliation of Iowa data" (footnote omitted); NDPSC at 7 (concluding that Qwest's data are accurate based

> The continued reliability of Qwest's performance reports is a significant concern, and one the IPUC expects to monitor closely. The inability of the Liberty data reconciliation efforts to fully explain a significant percentage of the discrepancies between Qwest's data and that of participating CLECs support that concern.

Idaho PUC at 8.

Although the Idaho PUC acknowledges that the accuracy of Qwest's data "is a significant concern," it, nonetheless, concludes that the audit provisions in the QPAP will serve as an effective tool in assessing the reliability of Qwest's data in the future. Idaho PUC at 8. But the Commission has emphasized that, when an incumbent local exchange carrier files a Section 271 Application, it is expected that the carrier "is already in full compliance with the requirements of Section 271 and submits with its Application sufficient factual evidence to support such compliance." *Michigan 271 Order*, ¶55. The audit provisions in the QPAP, designed to ensure *future* compliance cannot substitute for the required showing by Qwest that it is *presently* satisfying its Section 271 obligations. It would be flatly unlawful for the Commission, as Qwest urges, to conflate the purpose of an anti-backsliding plan designed to assure *future* statutory compliance and the required demonstration of *present* statutory compliance.[117]

Qwest cannot bridge the data accuracy gap with the KPMG OSS test. Even the Idaho PUC concedes that KPMG's OSS "testing revealed an unacceptably high level of human error in the manual processing of orders," and that "the problems persisted" after retesting.[118] Similarly, the Nebraska PSC admits that there is insufficient evidence "to validate whether this problem has

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on the Liberty data reconciliation process); NPSC at 5 (noting Qwest's data are accurate based on the Liberty study); CPUC at 41 ("relying on Liberty, the COPUC submits that Qwest's performance data and results are accurate").

[117] Commissioner Wefald of the NDPSC admits that it has a staff of only "4 ½ people" who are responsible for telecommunications and other issues. Concurring Opinion Commissioner Susan E. Wefald, July 1, 2002. Commission Wefald also concedes that "[t]he North Dakota legislature has not yet passed legislation that will set up the funding the NDPSC needs to monitor Qwest's performance in the future to prevent backsliding." *Id.*

[118] Idaho PUC at 6. Qwest contends that Liberty's analysis of approximately 10,000 orders and trouble tickets during the data reconciliation process somehow renders KPMG's findings of excessive human errors meaningless. However, as noted, Liberty's data reconciliation process is fundamentally flawed because Liberty failed to confirm

been corrected."[119] Against this backdrop, there is no sound basis upon which Qwest can reasonably contend that the KPMG OSS test or the other audits and data reconciliation processes upon which it relies somehow validated the accuracy of its performance data.

2. Qwest's Performance Metrics Are Incomplete And Flawed.

Qwest's performance results are also unreliable because they omit important metrics, including service order accuracy. As DOJ recognizes, the lack of commercial performance data on the accuracy of Qwest's manually-processed orders is a "serious issue," particularly in view of KPMG's stated concerns regarding errors in Qwest's data. DOJ at 21.

Furthermore, Qwest's "New Build Policy" – which rejects CLEC orders in 30 days or less "for lack of facilities while Qwest's retail customers are allowed to wait for facilities to become available" – discriminates against CLECs and has "the perverse effect of masking in Qwest's performance reports its delays in filling competitors' orders, because competitors' rejected and 'held' orders are excluded from" performance results.[120] Qwest's exclusion of such orders from its performance results necessarily means that its reported rejection notice intervals are understated, and that its ordering and provisioning results are inaccurate.[121]

3. Qwest's Own Data Do Not Demonstrate Statutory Compliance.

Even Qwest's inadequate and unreliable data show that it has not satisfied its checklist obligations. Qwest's rejection rates are unacceptably high by any commercial standard.[122] The comments confirm that Qwest's total flow through rates are inadequate and that it relies

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that Qwest's purported corrective measure actually eliminated or reduced the rate of human error to acceptable levels. *See* Finnegan Decl. ¶¶38-77.

[119] *See* Nebraska PSC Order Approving Qwest's 271 Application and Recommending Approval to the Federal Communications Commission, entered June 12, 2002 at 4.

[120] Covad at 4. *See also* Finnegan Decl. ¶¶ 116-126; Wilson Decl. ¶¶ 42-45.

[121] Covad at 4; Finnegan Decl. ¶¶ 116-126.

[122] WorldCom Lichtenberg Decl. ¶¶28-30.

excessively on manual processing which increases the risk of provisioning error and delay.[123] Qwest also does not provide timely, accurate and complete status notices.[124]

Similarly, Qwest does not provision CLEC orders at parity. Thus, for example, Qwest has failed to meet the parity standard for installation of UNE-P POTS and UNE-P Centrex orders.[125] The comments also confirm that Qwest does not perform at parity in the area of maintenance and repair,[126] and that Qwest's repeat repair trouble report rates for CLEC orders are higher than those for retail orders.[127]

In its July 19 *ex parte*, Qwest attempts to explain away its own performance results showing a lack of parity in the MR-8 measure for UNE-P Centrex orders in Iowa. Pointing to a "structural anomaly in the PID associated with disaggregation as to retail analogue level," Qwest contends that it is not appropriate to compare its wholesale UNE-P Centrex performance to retail Centrex performance because: (1) retail Centrex is used exclusively for business orders, while UNE-P Centrex "is used 38% of the time to serve residential premises;" (2) trouble report rates for residential orders are higher than those for business orders; and (3) because Qwest's retail Centrex product is based on 100 pair terminal block increments and portions thereof are used by CLECs, "the terminations in the terminal block [are] susceptible to repair trouble due to frequent technician access."[128] Qwest's contentions cannot withstand analysis.

Qwest cannot legitimately contend that its performance failures under the MR-8 measure for UNE-P Centrex orders reflect higher trouble report rates for residential customers. Residential customers have a higher repair rates because of *inside wiring* problems. And

[123] *See, e.g.,* Covad at 39-40; WorldCom at 10; WorldCom Lichtenberg Decl. ¶¶37-42.
[124] Finnegan/Connolly/Menezes Decl. ¶¶175-189; Covad at 25-28; WorldCom at 12-15.
[125] Touch America at 9; WorldCom at iii; WorldCom Lichtenberg Decl. ¶¶57-62; Finnegan Decl. ¶¶187-188, 197.
[126] Touch America at 9.
[127] *See, e.g.,* WorldCom Lichtenberg Decl. ¶66; Finnegan Decl. ¶¶200-201.

troubles attributable to inside wiring cannot skew MR-8 performance results, because the measure already excludes troubles coded to customer premises equipment.[129] Similarly, UNE-P Centrex orders are susceptible to higher trouble rates because of frequent technician access to the common terminal block, but the work that Qwest performs to install UNE-P Centrex is the same whether the end-user is a business or residential customer. Most important, no physical work activity is required to place a residential customer on Centrex; the customer's phone number is simply moved into the Centrex common block *via* the switch software.[130]

III. THE COMMENTS CONFIRM THAT QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

Qwest began reducing its inflated rates in Colorado only months ago. And Qwest unilaterally lowered its rates in the other four states only *days* before filing the joint application. In every state except Colorado, Qwest's rate reductions are temporary and are expressly subject to change. Simply put, Qwest has offered this Commission no assurances that CLECs will continue to have access to the new rates implemented by Qwest once Qwest has obtained Section 271 approval.

The Commission cannot rationally rely on the state commissions to ensure that Qwest's recurring and non-recurring rates will be set at cost-based levels in future rate proceedings. In

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[128] July 19 *ex parte,* attachment at 30.

[129] Qwest Appendix D, Attachment 5, ROC 271 working PID Version 4.0, MR-8.

[130] Assuming *arguendo* that technician access to the terminal block is a factor in trouble report results as Qwest suggests, then Qwest's performance results showing parity under the MR-8 measure for UNE-P POTS and business and residential resale are highly suspect. The vast majority of CLEC UNE-P POTS orders do not require a dispatch and simply involve a billing change when a customer migrates from Qwest to a CLEC. In sharp contrast, a higher percentage of Qwest installations require an outside dispatch or a dispatch inside the central office. To the extent that Qwest's MR-8 results for UNE-P POTS, business and residential resale orders show parity, the performance results could reflect that a larger percentage of CLEC orders required no physical work activity. If Qwest's theory regarding the purported impact of technician access on trouble repair rates is true, then the standard for MR-8 UNE-P POTS and business and residential resale should be changed as well. Additionally, if Qwest's theory is taken to its logical conclusion, Qwest's parity results under MR-8 for UNE-P POTS and business and residential resale orders in its Application should not be accepted at face value.

the more than six years since the Act was passed, these states have *never* established TELRIC-compliant rates. The UNE rates adopted by the Iowa commission, for example, were found to violate the 1996 Act by a federal court because the Iowa state commission *openly refused* to apply TELRIC principles. The Idaho state commission conceded that the UNE rates relied upon by Qwest – which were initially adopted in 1997 using 1996 data – are so stale that there could be no finding that they are TELRIC-compliant. The Nebraska state commission simply split the baby and set UNE rates using the discredited Benchmark Cost Proxy Model and severely flawed inputs that reflected Qwest's "actual" costs. The North Dakota state commission, which last adjudicated the UNE prices in 1997, established only "interim" rates subject to true-up upon the completion of a subsequent proceeding, which has never taken place. And although the Colorado commission did conduct more thorough rate proceedings, it ultimately adopted rates based on non-TELRIC inputs. On this record, there can be no legitimate finding that these state commissions have established or will establish cost-based rates.

Even if the Commission were willing to accept Qwest's claim that its last minute rate reductions will not be undone once Qwest obtains interLATA authority, Qwest's application must be denied. Qwest has made no serious attempt to defend the rates in Idaho, Iowa, Nebraska and North Dakota on the merits. Qwest instead relies on a benchmarking analysis to demonstrate that the rates in those states are cost-based. But, after CLECs pointed out that Qwest's rates in those states do not, in fact, pass the Commission's benchmarking analysis, Qwest frankly conceded that it made a fundamental error in its benchmarking analysis for Iowa, Nebraska and North Dakota and that its rates do not, in fact, satisfy the Commission's benchmarking analysis.[131] In apparent recognition that this concession is fatal to its application, Qwest has

[131] *See Qwest July 22 Ex Parte Letter* at 1.

reached for yet another placebo: a small rate reduction in two of the states "within the next week or two."[132]

But even after those rate reductions to account for the fact that Qwest's initial analysis failed to account for sold exchanges, Qwest's rates will still flunk the Commission's benchmarking analysis, because Qwest also failed to account for numerous loop rates (including OSS, and cross-connect rates) and used improper minutes of use assumptions in its switching rate comparisons. Accordingly, Qwest must defend the Iowa, Idaho, Nebraska and North Dakota rates on their own merits. And such an analysis confirms that those rates are not the product of any rational application of the Commission's TELRIC rules. Moreover, even if Qwest's rates in the other four states did compare favorably to Colorado, Qwest still could not meet its checklist item 2 burden, because the record confirms that Qwest's Colorado recurring switching and loop rates, and its non-recurring rates, are vastly overstated by numerous clear TELRIC errors.

In addition, as demonstrated by AT&T and WorldCom, there is separate and independent evidence that Qwest's rates in Idaho, Iowa and North Dakota violate Checklist Item 2. Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – the total revenues available to new entrants in Idaho, Iowa and North Dakota are not sufficient to cover an efficient new entrant's costs in those states. Thus, Qwest's UNE rates in Idaho, Iowa, and North Dakota are discriminatory in violation of Checklist Item 2.[133]

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[132] *Id.*

[133] The fact that Qwest's UNE rates in these states preclude competitive local entry also shows that a grant of Qwest's applications would contravene the public interest.

A. Qwest's Iowa, Nebraska and North Dakota UNE Rates Cannot Be Justified On A Benchmarking Theory.

Unable to defend its Idaho, Iowa, North Dakota and Nebraska rates on the merits, Qwest claims that it "adjusted its core UNE rates in Idaho, Iowa, Nebraska and North Dakota in a manner designed to comply with the Commission's benchmarking analysis, using Colorado as the benchmark state."[134] Qwest's unilateral rate reductions are not, in fact, sufficient to support a "benchmarking" finding of TELRIC-compliance.[135] Rather, even after accounting for Qwest's unilateral rate reductions, Qwest's rates in Iowa, North Dakota and Nebraska are substantially higher than those in Colorado, on a cost adjusted basis.[136].

Loop Benchmarking. Qwest now concedes that its Iowa, Nebraska and North Dakota loop rates do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.[137] Qwest's proposes a post-reply fix of further rate reductions – to account for the fact that Qwest's initial analysis reflected the costs of exchanges that Qwest did not own – but it is far too late in the process for that approach; rather, Qwest should be required to withdraw its application and refile after it has implemented TELRIC-compliant rates.[138]

Furthermore, even if Qwest properly accounts for its sale of certain rural exchanges, Qwest's loop rates still would fail the Commission's benchmarking analysis. Qwest's recurring

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[134] Application at 163.

[135] *See* DOJ Eval. at 32; WorldCom at 32-34; AT&T at 52-55.

[136] *See id.*

[137] *See Qwest July 22 Ex Parte Letter* at 1 ("Qwest has re-examined the version of the model it used and confirmed that, as WorldCom and AT&T point out, certain exchanges in Idaho, Iowa and North Dakota that Qwest has sold were erroneously included in the benchmark analysis that Qwest used to derive the rates set forth in the application").

[138] The Commission has, on occasion, waived the complete when filed rule in very limited circumstances, *i.e.,* where an applicant implemented very limited rate reductions to only a handful of rates after filing the initial application. Here, Qwest is proposing to implement numerous last minute rate changes. Moreover, given Qwest's track record of decreasing one set of rates while increasing another set of rates (or even adding new rate elements),[138] parties will be forced to evaluate not only the rates that Qwest purports to reduce, but to evaluate *all rates* to ensure that Qwest has not attempted to recover the purported rate reductions through other rate elements. Thus, the Commission should fully enforce its complete when filed rule by, at a minimum, restarting the 90-day period for Qwest's application.

loop rates, as indicated by Qwest's SGAT, include OSS, cross-connect and grooming charges that are not reflected in Qwest's benchmarking analysis.[139] Accounting for these rate elements in the benchmarking analysis shows that Qwest's rates in Iowa, Idaho and North Dakota are still higher, on a cost adjusted basis, than those in Colorado.

Qwest does not deny that it failed to reflect these significant costs in its benchmarking analysis. Instead, Qwest argues that these rate elements should be ignored. Qwest notes that the Commission has in the past found that daily usage feeds ("DUF") rates should not be included in switching benchmark analysis, and claims that this justifies Qwest's failure to account for recurring OSS, cross-connect and grooming charges.[140] Qwest is wrong. DUF records are not part of the network functionality (DUF records are generally used only for billing and record-keeping purposes); OSS, cross-connects and grooming, in contrast, are network functionalities that must be purchased to obtain a working loop. Thus, there is no question that those rate elements must be included in any valid benchmarking analysis.

Qwest's argument to the contrary is nothing less than a continuation of the anticompetitive recurring and nonrecurring charge shell game that began when Qwest first reduced its rates on the eve of this joint application. As AT&T explained (at 52-53), Qwest's reduced loop and switching rates were accompanied by *increases* in other rate elements, as well as the addition of new rate elements. Qwest is now arguing that the Commission should ignore the rate elements that it increased and focus solely on rates that it decreased. The Commission should not – and cannot consistent with the 1996 Act and the requirement of reasoned decision making – allow Qwest to game the Commission's benchmarking short cut. To the extent that the Commission allows Qwest to avoid scrutiny of its rates in Idaho, Iowa, Nebraska and North

[139] *See* DOJ Eval. at n.155; AT&T at 53.
[140] *See Qwest July 22 Ex Parte Letter* at 7.

Dakota by benchmarking those rates against Colorado rates, the Commission must insist that Qwest account for *all* loop-related elements, and not just those that Qwest has reduced in order to gain Section 271 approval.

Qwest also argues that the Commission should exclude the recurring OSS rate from the benchmark analysis because, according to Qwest, the OSS rate is a non-recurring charge, not a recurring charge.[141] This assertion is flatly contradicted by Qwest's SGAT, which expressly lists the OSS rate as a *recurring rate element*, not as a non-recurring rate element. And even if Qwest files another eleventh hour SGAT amendment to re-label the OSS rate as a non-recurring rate, Qwest bears the burden of proving that this OSS charge is, in fact, a one-time expense and that the new NRC is TELRIC-compliant. Moreover, Qwest must explain why such NRCs are appropriate in some of its states, but not in others.

Qwest also claims that its recurring grooming rates should be excluded from the benchmarking analysis because those charges are difficult to measure. That is nonsense. Benchmarking is a privilege, not a right. If Qwest believes that accounting for all relevant charges in a benchmarking analysis is too difficult, then it must eschew the benchmarking short cut and defend the non-Colorado rates on their merits. In any event, it is not, in reality, difficult to measure those costs. In Colorado, grooming rates apply only to lines served by integrated digital loop carrier, and AT&T's benchmarking analysis accounted for that fact by computing the total grooming charges that would apply based on the number of lines currently served by integrated digital loop carrier in Qwest's network.[142] In Nebraska and North Dakota, grooming

[141] *See id.* Qwest does not dispute that the grooming and cross-connect charges are recurring rates.
[142] *See* Lieberman Decl. ¶ 14.

rates apply to all lines, and AT&T computed grooming rates accordingly.[143] Thus, AT&T's analysis accounts for the fact that the application of grooming rates vary from state-to-state.

Correcting for all of these errors in Qwest's analysis confirms that Qwest's loop rates in Iowa, North Dakota and Nebraska are higher than those in Colorado on a cost-adjusted basis, by 12%, 31% and 13%, respectively.[144] And Qwest's UNE-L loop rates in those states exceed Colorado's UNE-L loop rates on a cost-adjusted basis by 9%, 35%, and 17%, respectively.[145] Thus, contrary to Qwest's claims, its UNE loop rates in Iowa, Nebraska and South Dakota do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.

Non-Loop Benchmarking. Qwest's non-loop rates in Iowa, Nebraska and North Dakota also fail the Commission's benchmarking analysis, because Qwest's comparisons improperly rely upon national average "minutes of use" that do not reflect the relevant actual minutes of use for each state.[146] Because Qwest's non-loop benchmarking analysis starts with the "wrong" number of minutes – which even Qwest concedes drives the results of its benchmarking analysis – Qwest's analysis ends with the wrong benchmark results.[147]

State-specific minutes of use are publicly available from Qwest's ARMIS reports.[148] Qwest points out that benchmarking comparisons require that the ARMIS data be divided between interoffice and intraoffice minutes, and notes that the state-specific data showing the proper allocation of those minutes has not been made publicly available by Qwest.[149] Because AT&T and WorldCom do not have access to Qwest's state-specific interoffice vs. intraoffice

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[143] *See id.*

[144] *See* Lieberman Decl. ¶ 13.

[145] *See id.*

[146] *See* DOJ Eval. at 32; WorldCom at 32-34; AT&T at 52-55.

[147] *See* WorldCom at 32-34; AT&T at 52-55.

[148] Lieberman Reply Decl. ¶ 17.

[149] *See Qwest July 22 Ex Parte Letter* at 3.

minutes of use allocations, Qwest contends that their benchmarking analyses – which use state-specific total minutes and estimated state specific intraoffice/interoffice allocations – are imperfect. The Commission has no choice in these circumstances, Qwest concludes, but to rely upon Qwest's national average-based comparisons. That argument makes no sense.

It is *Qwest's* burden to establish that its rates in the other states compare favorably to its benchmark state on a cost-adjusted basis. If Qwest chooses not to supply the Commission and the parties with the allocation data that it possesses, then it cannot take advantage of the benchmarking shortcut. And if benchmarking is to be done in the face of Qwest's refusal to provide the actual allocation data, reasoned decision making and the Commission's own decisions require that it be done on the basis of the best available state-specific information.

As the Commission has explained, "UNE rates are set by state commissions based on state-specific costs divided by total demand. The UNE rates therefore necessarily reflect state-specific MOU and traffic assumptions. Use of state-specific MOU per-line and traffic assumptions to develop per-line per-month UNE-platform prices for a benchmark state and an applicant states is therefore consistent with the manner in which states establish the UNE-Platform rates."[150] These Commission findings unambiguously confirm that the use of state-specific minutes of use produce far more accurate benchmarking results than to national average minutes. The Commission's benchmarking analysis is supposed to be an objective short cut test to assess whether an applicant state's rates fall within a reasonable range of TELRIC-compliance. To allow applicants to pick-and-choose the minutes of use on which to pin their applications – which can greatly affect that analysis – would allow applicants to game the system, and would make a mockery of the entire Section 271 applications process.

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[150] *See New Jersey 271 Order* ¶ 53.

The fact that Qwest has not made its state-specific interoffice/intraoffice allocations available for the purposes of conducting a fully state-specific benchmarking analysis certainly does not mean that a better approach is to abandon *all* state-specific minutes of use data, and base the benchmarking approach on national minutes of use assumptions and national interoffice/intraoffice minutes allocations that are necessarily wrong.[151] On the contrary, to the extent that non-state-specific assumptions are necessary under either approach, common sense and basic mathematics dictate which a benchmarking analysis which starts with state-specific total minutes of use would more accurately reflect relative costs than an analysis that relies on *neither* state-specific total minutes, nor state-specific interoffice/intraoffice allocations.[152]

Qwest attempts to justify its use of national average minutes in its benchmarking analysis on the grounds that in some cases, the national average minutes data produce greater state-to-state cost-adjusted rate differences than would be produced by the state-specific data, and in other cases the national average minutes data produce lower state-to-state cost-adjusted rate differences than produced by the state-specific data.[153] Qwest also points out that the relative difference in the national average and state-specific benchmarking analysis may vary from year to year (because the total number of minutes varies from year to year).[154] But that is precisely why the more accurate state-specific data must be used – it would be entirely arbitrary to endorse Qwest's position that an RBOC can choose whichever data is most beneficial with respect to the particular states and at the particular times that the RBOC chooses to file applications.[155] And

[151] *See* Lieberman Reply Decl. ¶ 20.

[152] *See id.* Qwest also claims that the fact that AT&T's and WorldCom's benchmarking analysis fails to reflect state-specific allocations of minutes between originating and terminating calls, and between calls to an access tandem and calls direct to a POP. As explained in that attached declaration of Michael Lieberman, those allocations have little, if any, impact on the results of the benchmark analysis. *See* Lieberman Reply Decl., n.1.

[153] *See Qwest July 22 Ex Parte Letter* at 3-5.

[154] *See id.*

[155] *See* Lieberman Reply Decl. ¶ 21-22.

Qwest has clearly employed such gamesmanship here. Using state-specific minutes-of-use, and state-specific estimates for the allocation of those minutes shows that Qwest's Iowa, Nebraska and North Dakota non-loop rates fail the Commission's benchmarking analysis.[156] On the other hand, Qwest's flawed non-loop benchmarking analysis – which is based on national minutes – produces a distinctly more favorable results for Qwest.

Qwest's false claim that the use of national average minutes to conduct a benchmarking analysis does not benefit Qwest also is irrelevant (in addition to being patently false). The purpose of the Commission's benchmarking analysis is to determine whether rates in a particular state are within some reasonable range of the rates in another state. The proper methodology for conducting that analysis does not depend on whether one methodology systematically produces higher or lower results than a competing methodology. Rather, the proper methodology is that which systematically produces the most accurate results. And as explained by AT&T and WorldCom, and as recognized by this Commission in the *New Jersey 271 Order* (¶ 53), the most accurate benchmarking analysis is that which is based on state-specific minutes, and if necessary state-specific assumptions relating to the allocation of those minutes.[157]

The bottom line is this: a properly conducted benchmarking analysis – using state-specific total minutes and best estimates of how those minutes are allocated – confirms that Qwest's switching rates in Iowa, Nebraska and North Dakota fail the Commission's benchmarking analysis. Qwest's non-loop rates in those states exceed those in Colorado by 4%, 48%, and 12%, respectively.[158] Thus, contrary to Qwest's claims, its UNE rates in those states do not satisfy the Commission's benchmarking analysis.

[156] *See* Lieberman Reply Decl. ¶ 23.
[157] *See* Lieberman Reply Decl. ¶ 22.
[158] *See id.* ¶ 23.

B. Qwest Has Failed To Satisfy Its Burden Of Proving That Its Colorado UNE Rates Are TELRIC-Compliant.

The record in this proceeding also confirms that Qwest's Colorado non-recurring and recurring charges – which also are the foundation of its benchmarking analysis for the other four applicant states – are not remotely TELRIC-compliant.

Colorado Non-Recurring Rates. The Commission has long recognized that cost-based nonrecurring charges ("NRCs") are critical to making competitive local telephone entry economically feasible.[159] The record confirms that Qwest's Colorado NRCs – which are based on Qwest's non-recurring cost model – are inflated by numerous clear TELRIC errors.[160] The reason that Qwest's NRCs are so overstated is that Qwest's non-recurring cost model is infected with several clear TELRIC errors. These errors include: (1) the improper recovery of disconnect costs at the time when a loop is initially provisioned; (2) recovery of costs for manual work activities that would be performed electronically in a forward-looking network;[161] (3) recovery of costs for activities that are unnecessary in a forward-looking network; (4) recovery of nonrecurring costs that should be recovered through recurring rates; and (5) reliance on improperly computed time estimates for various work activities.[162]

As one example, Qwest's hot cut rates are vastly inflated above cost-based levels. Qwest's Colorado SGAT reflects two separate hot cut charges. One is described as a "coordinated cut-over" and costs about $60. The other is described as a "coordinated cut-over

[159] *See, e.g., AT&T Communications,* 103 FCC 2d 277, ¶ 37 (1985) ("It is evident that nonrecurring charges can be used as an anticompetitive weapon to . . . discourage competitors"); Second Memorandum Opinion and Order on Reconsideration, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd. 7341, ¶ 43 (1993) ("absent even-handed treatment, nonrecurring reconfiguration charges could constitute a serious barrier to competitive entry").

[160] *See* DOJ Eval at n.156; AT&T at 59-69.

[161] In this regard, AT&T explained that, among other problems, Qwest's NRCs are based on understated OSS flow through rates, thereby resulting in overstated manual order processing. Attached hereto (as Attachment 4) is an attachment to the testimony of Qwest witness Robert Brigham showing that Qwest experiences an OSS flow through rate of 94% to 96%.

with testing" and costs about $170. As demonstrated by AT&T, correcting the clear TELRIC errors in Qwest's cost study shows that neither hot cut rate should exceed about $13.[163] And based on AT&T's fully TELRIC-compliant Colorado non-recurring cost study, Qwest's hot cut rate should not exceed $2.08.[164]

The fact that Qwest's hot cut rates are overstated is confirmed by comparing those rates to the hot cut rates in other states where hot cut rates have been litigated, and that have obtained Section 271 approval. In New Jersey and New York – both states where hot cut rates were litigated and where the state commissions recently concluded UNE rate proceedings – the hot cut rate is $35. By contrast, as noted above, Qwest's hot cut rate is at least nearly double that amount, and as much as nearly five times higher than that rate.[165]

Qwest also provides some state-to-state comparisons of its Colorado hot cut rates. But Qwest focuses only on its $60 hot cut rate, and compares that rate only to states where hot cut rates have *not* recently been litigated. This distinction is important. As the Commission is well-aware, UNE rate proceedings are mammoth undertakings. Accordingly, CLECs focus their efforts in those proceeding on areas that will most affect their business plans. Until recently, AT&T and other CLECs did not view residential UNE-L entry as a feasible entry plan, and did not, therefore, have incentive to focus litigation resources on issues relating to that type of entry, *e.g.,* hot cut rates. More recently, however, some CLECs (including AT&T) have determined

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[162] *See* Weiss Decl. ¶¶ 10-36.

[163] *See id.*

[164] *See id.*

[165] According to Qwest, its $60 hot cut rate provides the same set of services that are provided in other states that have only one hot cut rate. It is not clear that Qwest is correct. Other states, like New Jersey and New York, do in fact provide hot cuts with "testing." However, it is unclear from a comparison Verizon's cost studies to those of Qwest's that the testing and other activities that Verizon performs for hot cuts are exactly the same as the testing and other activities that Qwest provides. In particular, Qwest's and Verizon's cost studies use different work groups, different descriptions for activities, and rely on different assumptions regarding the amount of work-time associate with each activity. The same problems exist when attempting to compare Qwest's Colorado hot cut rates to those in Southwestern Bell and BellSouth territories.

that in some areas residential UNE-L may be a feasible entry strategy. Accordingly, CLECs have begun focusing more litigation resources on ensuring that UNE-L related entry rate elements were priced at cost-based levels. Two of the states where CLECs have focused litigation resources on BOC hot cut rates are New Jersey and New York. In New Jersey, for example, CLECs pointed out that Verizon's $160 hot cut charge was vastly overstated, and because of that charge, Verizon was forced to withdraw its New Jersey Section 271 application and resubmit that application after reducing the hot cut charge to $35. Thus, there is no question, that comparing Qwest's hot cut NRCs to those in New York and New Jersey is far superior to comparison of Qwest's hot cut NRCs to those in states where the hot cut rate has not recently been litigated.

Qwest's "basic loop installation" NRC of $55.27 is also vastly overstated. The record confirms that adjusting Qwest's cost studies to correct for the myriad TELRIC errors that inflate almost all of Qwest's NRCs results in a basic loop installation NRC of $8.00.[166] And a truly TELRIC-compliant basic loop install NRC in Colorado – as measured by AT&T's Colorado non-recurring cost study – is approximately $0.29.[167]

One factor that substantially inflates Qwest's basic loop installation NRC is Qwest's imposition of inflated "disconnect" charges at the time of installation; in effect, Qwest charges CLECs (at an inflated rate) for losing customers even before the CLEC begins serving new customers. For example, Qwest has explained that it often does not fully disconnect a line when service is terminated; rather Qwest leaves the line connected to its network using a method called a "soft dial tone" (which is equivalent to a "warm dial tone").[168] This type of disconnect requires

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[166] *See* Weiss Decl. ¶ 42.

[167] *See Id.* ¶ 43.

[168] *See Qwest July 22 Ex Parte Letter* at 12.

far fewer activities – and hence costs – than a full disconnect. Yet Qwest's basic loop install NRC (which reflects disconnect costs) shows no adjustment to account for those costs.[169] In addition, installation of a "warm dial tone" line would be less expensive than a completely disconnected line, yet Qwest's basic loop installation does not reflect a reduction to account for the fact that many of Qwest's lines are "warm dial tone" lines.[170]

Colorado Recurring Charges. The record confirms that Qwest's Colorado recurring loop rates are inflated by several clear TELRIC errors. The Colorado PUC correctly adopted the HAI Model to compute loop rates. However, the Colorado PUC adopted Qwest-proposed inputs that plainly are not TELRIC compliant and that substantially inflate Qwest's Colorado UNE loop rates above TELRIC levels.[171] AT&T explained in its opening comments and attached declarations the many TELRIC errors that inflate Qwest's loop rates.[172] Moreover, as demonstrated in the attached reply declaration of Robert Mercer and Dean Fassett, the TELRIC errors that inflate Qwest's Colorado loop rates also substantially distort the deaveraging process in Colorado, thereby creating yet an additional barrier to entry.

Qwest's non-loop rates also are substantially inflated by clear TELRIC errors.[173] Qwest's attempt to respond to one of those TELRIC errors plainly are deficient. As demonstrated by AT&T in its initial comments, Qwest's recurring switching rates double-count vertical features costs because Qwest's rates include a separate vertical features charge that is already captured in the switching rates. Qwest attempts to rebut this fact with a technical

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[169] *See* Weiss Reply Decl. ¶¶ 3-10.

[170] *See id.*

[171] *See* Mercer/Fassett Decl. ¶ 13. The Colorado PUC responds only by pointing out that the rate-making process is difficult and that it believes that it did the best it could given that complexity. And Qwest has offered no legitimate response to these claims.

[172] *See* CPUC at 27-36

[173] *See* Mercer/Fassett Decl.

accounting argument. But as explained in the attached declaration of Michael Lieberman, Qwest's response only confirms that its rates double recover vertical features costs.[174]

C. Qwest's UNE Rates Create A Discriminatory "Price Squeeze."

Even aside from the problems discussed above, there is separate and independent evidence that the UNE rates in Idaho, Iowa and North Dakota violate Checklist Item Two.[175] Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – revenues are not sufficient to cover an efficient new entrant's costs in those states. Moreover, even accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry. Indeed, after accounting for an efficient entrant's internal costs of entry, the margins that are available to new entrants in Iowa, Idaho, and North Dakota are *negative*. Thus, Qwest's UNE rates in Idaho, Iowa, and North Dakota are discriminatory in violation of Checklist Item 2.[176]

As explained in AT&T initial declaration, the existence of a price squeeze also precludes a grant of Qwest's application because a grant of Qwest's application would contravene the public interest. *Kansas/Oklahoma 271 Order* ¶ 267. The Supreme Court has explained that the statutory term "public interest" "take[s] [its] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). As the Commission has held, Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a

[174] *See* Lieberman Decl. ¶¶ 33-37. Qwest also attempts to rebut the fact that its switching fill factors are vastly understated by pointing out that sometimes a switch port may be used by a "warm dial tone" event though no customer is currently being served by that line. But the TELRIC compliant switching fill factor advocated by AT&T includes sufficient excess capacity to account for residential and business turn-over.

[175] *See* WorldCom at 32-34; AT&T at 69-71.

[176] *See* AT&T at 69-71.

time when their local monopolies would give them an "unfair advantage" over long distance competitors in, *inter alia*, providing "combined packages" of local and long distance service to customers who desire "one-stop shopping." *AT&T* v. *Ameritech*, 13 F.C.C. Rcd. 21438, ¶¶ 5, 39 (1998), *aff'd sub nom. U S WEST* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999). If, by contrast, long-distance entry were allowed before other carriers could provide competing combined packages, it would "threaten competition" in both the local and the long-distance markets by granting the BOC a monopoly in the provision of such combined services. *Id.* ¶ 5.

Moreover, the *Sprint* Court also confirmed that the Commission's lack of jurisdiction over retail rates was no bar to such an analysis, because the Commission can respond to a price squeeze without disturbing retail rates. Instead, because the Commission has said that TELRIC rates exist within a "band," one entirely permissible solution is to "'fix[] the wholesale rates, which [a]re under its jurisdiction, at a lower level within'" that band. *Id.* at 564 (citing *Conway*, 426 U.S. at 279). Here, because, as AT&T has shown, Qwest's rates are not TELRIC-compliant to begin with, there is certainly plenty of room for downward movement.

Furthermore, as other courts have recognized, implicit subsidies – "that is, 'the manipulation of rates for some customers to subsidize more affordable rates for others'" – are fundamentally incompatible with efficient competition. *See Alenco Communications Inc.* v. *FCC*, 201 F.3d 608, 616 (5th Cir. 2000); *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 406 (5th Cir. 1999). Accordingly, Section 254(d) expressly authorizes state commissions to adopt universal service mechanisms to convert intrastate implicit subsidies into explicit subsides. *See* 47 U.S.C. § 254(f). To be sure, some states have chosen for policy reasons of their own to maintain the pre-existing system of implicit subsidies, and have thus far declined to establish a competitively neutral system of explicit subsidies. To the extent that those policies facilitate a price squeeze, however, Section 271 precludes the Commission from granting interLATA authority in that state. And there is no rational basis for the Commission to disregard its public interest and nondiscrimination mandates and to reward state commissions and RBOCs that choose to maintain competition-foreclosing regulation that is contrary to the terms and core competitive purposes of the 1996 Act.

Qwest advances a scattershot of baseless criticisms against AT&T's margin analysis. First, Qwest asserts that AT&T improperly reflected Qwest's OSS rate as a recurring rate and not as a non-recurring rate. But as explained above, Qwest's OSS rate is currently listed in Qwest's SGATs as a recurring rate.[177]

Second, Qwest claims that AT&T should not account for NRCs because AT&T can pass those NRCs on to its customers. That argument ignores the current competitive environment. Qwest currently serves virtually all local residential customers. Therefore, new entrants must convince existing Qwest residential customers to switch carriers. A business plan that charges residential customers a large up-front charge for making switch is not economically viable because customers will not pay for the privilege of switching to a new carrier. Nor is it economically feasible for a CLEC to increase local rates to recover NRCs. CLEC rates are effectively capped by the rates charged by the incumbent LEC because customers will not switch to a new entrant that is charging higher rates. As a result, CLECs must recover NRCs through local rates, that are no higher than those charged by incumbent LECs. AT&T's margin analysis correctly reflects that reality.[178]

Third, Qwest claims that AT&T's access revenue estimates are too low. Those access revenues are based on actual observed average toll-related minutes of use from TNS Telecoms

[177] *See* Lieberman Reply Decl. ¶ 25.
[178] *See id.* ¶ 26

Bill Harvest market research.[179] Qwest does not challenge the accuracy of either of those inputs. Instead, Qwest asserts that AT&T's access revenues are too high because they are higher than Qwest's estimates.[180] The primary reason that Qwest's estimates are higher than AT&T's estimates is that Qwest (not AT&T) incorrectly computed access revenues.[181]

Fourth, Qwest claims that AT&T and WorldCom's analysis is flawed because they compute margins based on state-specific data. That argument is specious. The purpose of a margin analysis is to determine whether entry is economically feasible in a particular state.[182] To make that determination, it is necessary to account for the actual conditions in that state, including the actual number of minutes in that state. A proper margin analysis – like the analysis performed by AT&T and WorldCom – therefore must reflect state-specific minutes.[183]

Fifth, Qwest claims that the residential line weightings used in AT&T's analysis are undisclosed. In fact, the line weightings used in AT&T's margin analysis are those reported by Qwest on Qwest's web site.[184]

Sixth, Qwest claims that AT&T's analysis fails to account for the possibility that new entrants will find higher margins by offering a mix of residential and UNE-P services. Qwest is wrong. As explained in the declaration of Michael Lieberman, AT&T's analysis computed both the UNE-P margins and the resale margins that are available to new entrants in each zone. AT&T's state-wide margin figures are based on the higher of the two margins (the UNE-P and resale margins) that are available to new entrants in each zone.[185]

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[179] *See Id.* ¶ 27.
[180] *See id.*
[181] *See id.*
[182] *See* Lieberman Reply Decl. ¶ 28.
[183] *See id.*
[184] *See id.* ¶ 29.
[185] *See id.* ¶ 30.

Seventh, Qwest claims that AT&T's stated internal costs of more than $10.00 are not supported. That claim also is false. The declaration of Steven Bickley explains in detail how the $10.00 figure was computed. Furthermore, Mr. Bickley demonstrated that the $10.00 plus estimate is not based on AT&T's actual internal costs, but is based on (lower) projected figures that AT&T seeks to achieve in the future and that are a reasonable estimate of an efficient carrier's internal costs.

IV. QWEST DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND RESALE.

AT&T demonstrated in its opening comments that Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, in violation of its checklist obligations.[186] AT&T will not repeat those claims in these reply comments, but will simply note that with respect to two of those issues, developments since the comments confirm that Qwest's SGATs do not satisfy section 271.

First, in its recent *Virginia Arbitration Order*, the Commission held that the exception to the unbundled switching requirement for customers with four or more lines "applies on a 'per location' basis," and not on a "per-customer per wire center" basis, as Qwest's SGATs provide.[187] The Commission expressly found that "rule 51.319(c)(2) is best interpreted as applying when the competitive LEC is serving a customer that has four or more lines at a single location."[188] As the Commission explained, the "per-location" method is the only interpretation of the UNE Remand Order that is consistent with the language of the order and the purposes of

[186] AT&T at 71-106 & Wilson Declaration.

[187] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for the Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 360 (rel. July 17, 2002) ("*Virginia Arbitration Order*").

[188] *Id.*

the four-line exception.[189] The Commission's *Virginia Arbitration Order* thus conclusively establishes that Qwest's Colorado SGAT, which provides that the exception "will be calculated using the number of DSO-equivalent access lines CLEC intends to serve an End User Customer within a Wire Center,"[190] is unlawful and fails to satisfy section 271(c)(2)(B)(vi) (switching).[191]

Second, Covad's comments confirm that Qwest's refusal to build facilities for CLECs on the same terms that it builds for itself is discriminatory and unlawful.[192] Indeed, Covad also confirms that, when facilities are not available, rather than holding the order as it does for its retail customers, Qwest simply rejects the order (either immediately, as in Idaho, Nebraska, and North Dakota, or after 30 days, as in Colorado and Iowa).[193] And as noted above, Qwest's policy of rejecting orders artificially improves its provisioning performance.[194]

Qwest's refusal to build loop facilities for CLECs is particularly indefensible given that CLECs are already paying for new facilities in loop rates. The cost models that generate Qwest's loop rates contain "fill factors" that are supposed to provide enough capacity to meet current demand, a reasonable amount of growth, a capacity for administrative spares. The lower the fill factor, the more spare or excess capacity is built into the network, which increases cost on a per unit basis for the current customer base or CLEC purchasing UNEs. For example, if the fill factor used for DS1 loops is 50%, the assumption is that Qwest will have a spare DS1 for every DS1 in use, *i.e.*, double the investment currently required for DS1. When the CLEC pays for a DS1 loop, it is paying for a network that has been actually priced based on 2 DS1s. If Qwest

[189] *Id.* ¶¶ 361-63.

[190] SGAT §§ 9.11.2.5.2, *see also id.* § 9.11.2.5.1. In this five-state application, this issue is applicable only to Colorado, because Denver is the only MSA in these states in which the switching carve out exception applies.

[191] *See* AT&T at 95-98.

[192] *See* Covad at 34; AT&T at 82-85; *Local Competition Order* ¶ 315.

[193] *See* Covad at 35-36; AT&T at 84-85.

[194] *See* Covad at 36.

refuses to build new facilities, thereby allowing the utilization and thus the fill factor to increase, CLECs will be forced to overpay for the UNEs. For these and the many other reasons laid out in AT&T's opening comments, Qwest's SGATs fail to meet the requirements of Section 251(c).

V. QWEST HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272.

Nothing in the comments that have been submitted changes the fundamental fact that Qwest has utterly failed to meet its burden of establishing that Qwest and its section 272 affiliate will comply with each of the requirements of section 272 if Qwest's application is granted. Despite the critical nature of section 272 compliance, *e.g.*, *Texas 271 Order* ¶ 395, the few commenters that have discussed section 272 compliance – the state commissions of Colorado, Iowa, and North Dakota – present no new evidence to meet Qwest's burden. In fact, these comments do not even discuss, let alone refute, the matters raised in AT&T's opening comments that established Qwest's failure to meet its burden of proof.

For example, none of the commenters discuss Qwest's failure, as found by the Minnesota ALJ, to present evidence that it does not and will not jointly own switching and transmission facilities, either directly or indirectly, with its section 272 affiliate. Qwest's bare promises on this topic should be afforded no weight, especially given that Qwest chooses to not even describe its network ownership plans except in the vaguest terms.

The limited comments from the state commissions on section 272 also present no further evidence concerning the requirement, in section 272(b)(3), that Qwest and its section 272 affiliate have "separate officers, directors, and employees." As the Minnesota ALJ found, Qwest is barred by section 272(b)(3) from maintaining an integrated workforce of BOC and affiliate employees, with regular "transfers" back and forth between the companies and overlapping reporting relationships. The only commenter that even discusses compliance with section

272(b)(3) – the comments from the North Dakota commission, *see* pp. 189-90 – simply recite Qwest's promises concerning employee separation, without reviewing any tangible evidence as called for by the Minnesota ALJ.

Nor do any commenters discuss or refute the Minnesota ALJ's finding that Qwest was in violation of section 272(b)(5)'s requirement of "arm's length" transactions because both Qwest and its section 272 affiliate depend on their joint parent, QSC, to provide legal, public policy, and financial services for all of their transactions. And no commenter has explained how Qwest can be found to have posted all section 272 affiliate agreements when no agreements are posted to reflect the (undisputed) coordinated, planned transfer of employees between these companies.

Finally, the commenters offer no discussion concerning Qwest's failure to establish that it will comply with its nondiscrimination obligations under section 272(c) and with the joint marketing restrictions of section 272(g). As AT&T established in its opening comments, echoing the findings of the Minnesota ALJ earlier this year, the joint services on which Qwest and its affiliate are dependent present both the opportunity and incentive for serious misuse of confidential information. Qwest and the commenters do not even acknowledge this problem, let alone present any evidence of Qwest's efforts to prevent the misuse of such confidential information by joint-service providers. Similarly, the commenters, like Qwest in its application, ignore Qwest's obligations to submit tangible proof of its planned compliance with the joint-marketing restrictions under section 272(g) (including the equal access requirements), despite the fact that Qwest already billed the affiliate over $500,000 for joint-marketing planning.

At bottom, the limited comments submitted concerning section 272 compliance highlight, rather than remedy, the core problem with Qwest's application. Qwest cannot meet its burden by relying (as it does) on paper promises of section 272 compliance, especially in light of the multiple and specific findings of noncompliance by the Minnesota ALJ.

VI. QWEST'S ENTRY INTO THE INTERLATA MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

As AT&T and other commenters demonstrated, Qwest has engaged in a pattern of discriminatory and other anticompetitive conduct that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Specifically, over the past five years, Qwest and its predecessor US WEST engaged in a pervasive effort to forestall competition in its local exchange markets at the same time that it launched illicit efforts to provide service across LATA boundaries.[195] In a variety of states and a variety of ways, Qwest has been responsible for inhibiting local entry, having been adjudicated "guilty" for, among other things, repeatedly violating section 271 and refusing to permit UNE-P testing and to provide access to inside wiring in multiple dwelling units.[196] And, as discussed above, Qwest has been revealed to have entered patently discriminatory secret interconnection deals, failing to file the agreements as required by Section 252, and worse yet, attempting to evade informed state commission and FCC review of its compliance with Section 271 checklist requirements by purchasing with these secret discriminatory deals the silence of complaining CLECs.[197]

These ongoing anticompetitive and unlawful actions conclusively refute Qwest's claim that it is, and will remain, "committed" to accelerating and completing "the process of opening its local markets to competition."[198] Both CompTel and Touch America have also cited

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[195] AT&T Comments at 119-133.
[196] *Id.* at 122-123, 130-133.
[197] *Id.* at 18-27, 120-122.
[198] *See* Qwest Application at 2.

extensive evidence before the Commission that, through an attempt to characterize its interLATA communications services as "IRUs" or long-term leasing of facilities, Qwest has intentionally circumvented the clear language and purpose of Section 271.[199] Other commenters have confirmed Qwest's pervasive pattern of entering into secret interconnection deals and purchasing CLEC silence in the Section 271 review process warrant a denial of Qwest's application.[200]

The DOJ has acknowledged that Qwest's secret deals, in particular, "are serious and deserve the Commission's careful attention."[201] The DOJ even recognizes that, if "the Commission finds that a violation has occurred, sanctions may be appropriate *and could include suspension or revocation of any Section 271 authority that the Commission may have granted in the interim.*"[202] Nevertheless, despite recognizing that these allegations "ultimately may raise questions as to the quality of the record,"[203] the DOJ stops short of recommending the denial of Qwest's applications pending review of the extent of Qwest's misconduct and the effect of that misconduct on the record.[204] Of course, it is the Commission that holds the responsibility for determining whether granting the applications would serve the public interest.[205]

And this clearly is the time and the case for the Commission to demonstrate the courage of the convictions that underlie the Act. The Commission must refuse to grant Qwest the right to provide interLATA services until Qwest has eradicated the consequences of its own

[199] CompTel Comments at 7-13; Touch America Comments at 20-24.

[200] CompTel Comments at 15-17; New Edge Comments at 3-4; Touch America Comments at 24.

[201] *Id.* at 3.

[202] *Id.* (*emphasis added*).

[203] *Id.* at 4.

[204] *Id.* at 5. Instead, the DOJ advocates assessing sanctions in another Commission proceeding, initiated by Qwest, in the very effort to distract and delay the state commissions', and this very Commission's, more forthright evaluation and punishment of this activity. *See, e.g.,* DOJ Comments at 3 &n.6.

anticompetitive and unlawful actions, or proved that there have been no such consequences. Whatever pressure Qwest produces or applies, the Commission must recognize that granting Qwest's request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open and will remain so."[206] As the Commission has recognized in the past, no such finding is possible if the "BOC has engaged in discriminatory or other anticompetitive conduct, or failed to comply with State and federal telecommunications regulations," because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations."[207]

It is difficult to imagine a more compelling "public interest" case for the denial of Section 271 authority than the situation in which Qwest has placed the Commission. Every party, from the DOJ to competing CLECs to the states, has recognized the severity of Qwest's own conduct in negotiating, entering and concealing the secret interconnection agreements that *already* have been the subject of adverse findings by independent governmental bodies in Iowa, Arizona and Minnesota. In this time of national resolve to establish and mandate corporate responsibility and effective government oversight, the Commission must find the resolve to deal squarely and forthrightly with Qwest's malfeasance.

Qwest's conduct is part of an extensive tradition of contempt for the "market opening" provisions of the Act. From its three FCC-adjudicated violations of Section 271 to its ongoing violations of that section and the Qwest-US WEST merger orders, from its refusal to test UNE-P

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[205] *Id.* at 3 (allegations "deserve *the Commission's* careful attention. The Department does not comment on whether Qwest's earlier failure to file the agreements violated Section 251 or 252. If *the Commission* finds that a violation has occurred . . .").

[206] *See SBC Texas 271 Order* ¶ 431.

in Minnesota to its entry inhibiting actions in Colorado and Washington, from its concealment of secret deals in Iowa to its similar concealment of such deals in Arizona and every other Qwest state, Qwest has attempted to thwart competition with the hope that any long-delayed sanction will be a trivial cost of doing illicit business. And a grant of Section 271 interLATA authority will reward this strategy.

The entire industry is now watching to see just how low (or high) the bar will be set for future section 271 applications. Approval of this application is a signal to the industry that, whatever the possible consequences of violating the Act and the Commission's rules might be, those consequences would not include a rejection of a section 271 application. Future applicants would know that there is no need to set non-discriminatory UNE prices or provide potential new entrants with full access to adequate non-discriminatory OSS systems without fear of the Commission rejecting their Section 271 applications. And future applicants could (and would) substantially reduce opposition to their applications by bribing CLECs to not oppose their applications by offering secret deals to CLECs that agree to sit on the sidelines. It is imperative that the Commission send a clear signal to the industry that it will strictly enforce the competitive checklist and the public interest requirements, and that the applicant (not the opponents of the application) bears the burden of proving that it has complied with those pre-conditions of intraLATA entry.

There is no question that a comprehensive review of the extent and effect of Qwest's violations of Section 251, 252 and 271 is only appropriately and effectively conducted in the context of the evaluation of Qwest's application. Indeed, it is hard to imagine misconduct that strikes more directly at the heart of section 271 review. There can be no doubt that "questions"

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[207] *Michigan 271 Order* ¶ 397.

are ultimately raised "as to the quality of the record" on which Qwest rests to gain interLATA entry under Section 271.[208] As discussed above, the efficacy of Qwest's OSS tests has been compromised, because they relied in material part on evaluation of favorably-treated carriers. And at the very same time, Qwest's approach of "buying off" CLECs that were bringing forward evidence of Qwest's failure to adhere to the Act's market opening requirements has subverted the entire Section 271 process. Undoubtedly, the easy, non-confrontational course is to shift the analysis of the severity and effect of Qwest's behavior to some other future proceeding, where monetary penalties could be assessed, or perhaps even Section 271 authority suspended.[209] But the Act requires more responsible adherence to its terms. The Commission cannot sway from its obligation to ensure that the record *in this very proceeding* adequately supports the conclusion that Qwest has met its burden under Section 271. Rather, the Commission must show the courage and resolve to follow the path mandated by true adherence to the Act, and find that Qwest has not met its burden of demonstrating that a grant of Section 271 authority presently is in the public interest.[210]

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[208] DOJ Comments at 3.

[209] *See, e.g.,* DOJ Comments at 3; Colorado PUC Comments at 64; Idaho PUC Comments at 13; Iowa Utilities Board Comments at 68.

[210] Granting Qwest's application is not in the public interest for an additional reason as well. Even if Qwest's performance data were accurate – and they are not – Qwest's performance assurance plans contain fundamental flaws that prevent them from serving as an effective deterrent against future backsliding. Thus, for example, the performance assurance plans do not currently include any measure on service under accuracy. As a consequence, Qwest will suffer no financial consequences for subpar performance in this area. Furthermore, the Idaho performance assurance plan inappropriately limits the remedies CLECs may pursue against Qwest for discriminatory conduct. In accepting Qwest's argument that the QPAP does not unreasonably restrict the remedies available to CLECs (IPUC at 13), the Idaho PUC ignores that the QPAP explicitly states that, "[b]y electing remedies under the PAP, the CLEC waives any cause of action based on a contractual theory of liability," as well as "any right of recovery under any other theory of liability… to the extent that such recovery is related to harm under contractual theory of liability (*even though it is sought through a non-contractual claim, theory, or cause of action*"). Qwest Idaho SGAT, Third Revised Exhibit K, May 24, 2002, §13.6 (emphasis added). On its face, the QPAP unduly restricts the remedial relief that CLECs may seek for Qwest's subpar performance. Accordingly, unlike other performance assurance plans included in applications approved by the Commission, the Idaho QPAP shields Qwest from facing a broad spectrum of consequences that would assure that it "continues to provide non-discriminatory service to competing carriers." *Texas 271 Order* ¶424. Similarly, although the Iowa Utilities Board contends "that the Iowa QPAP will provide sufficient assurance that markets will remain open after a grant by the FCC of auditing to provide in-region, interLATA services in the State of Iowa" (IUB at 70), it ignores that the

QPAP permits Qwest to challenge the authority of the State to make any changes to the plan. As a result, the Iowa QPAP "leave[s] the door open unreasonably to litigation and appeal," and creates the very real risk that the QPAP will not reflect the dynamism in the telecommunications market as this Commission has envisioned. *New York 271 Order*, ¶433. For these and other reasons, the performance enforcement plans included in the Application cannot possibly be effective in assuring that Qwest will satisfy its statutory obligations in the wake of Section 271 relief.

CONCLUSION

For the foregoing reasons, and for the reasons set out in AT&T's initial comments, Qwest's application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota should be denied.

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July 29, 2002

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I hereby certify that on this 29th day of July, 2002, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

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